APPELLATE JURISDICTION

IN THE NINTH CIRCUIT

Written March 1999
Updated September 2008

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I. INTRODUCTION

This outline of appellate jurisdiction in the Ninth Circuit synthesizes the statutes, cases and rules relevant to determining whether the court of appeals has jurisdiction over a given case.

Two basic questions to be answered in any appeal are: (1) whether there is a statute that confers appellate jurisdiction over the order being appealed, and (2) whether a timely notice of appeal from the order was filed.

The statutory bases for appellate jurisdiction in civil cases are discussed in Part II, p.1; and timeliness considerations are discussed in Part III, p. 130. In other types of appeals, both statutory bases and timeliness are covered in a single section. *See* VI, p. 234 (bankruptcy appeals), VII, p. 287 (agency and tax court appeals), and VIII, p. 295(direct criminal appeals).

This outline covers additional issues related to appellate jurisdiction, including the form and content of a notice of appeal and its effect on district court jurisdiction (*see* IV, p. 171), the scope of an appeal, i.e. the orders and issues that will be considered on appeal once it is determined there is a basis for exercising jurisdiction (*see* V, p. 192), and the constitutional limitations on appellate jurisdiction, such as the doctrines of standing and mootness (*see* IX, p. 373). The jurisdiction of the Federal Circuit, and issues particular to appeals from Guam and the Northern Mariana Islands are not covered here.

II. STATUTORY BASES FOR CIVIL APPEALS

The court of appeals has jurisdiction to hear an appeal only when a federal statute confers jurisdiction. *See* *United States v. Pedroza,* 355 F.3d 1189, 1190 (9th Cir. 2004) (per curiam); *Vylene Enters., Inc. v. Naugles, Inc. (In re Vylene Enters., Inc.)*, 968 F.2d 887, 889 (9th Cir. 1992). In civil appeals, the court has jurisdiction over final decisions pursuant to 28 U.S.C. § 1291, and over certain interlocutory decisions pursuant to 28 U.S.C. § 1292.

Jurisdiction is at issue in all stages of the case. *See* *Moe v. United States*, 326 F.3d 1065, 1070 (9th Cir. 2003) (holding government was not estopped from arguing district court lacked jurisdiction), *cert. denied*, 540 U.S. 877 (2003). Even

if the court of appeals has filed an opinion, the court can withdraw the opinion to ask for supplemental briefing on the issue of jurisdiction. *See* *Televisa S.A. De C.V. v. DTVLA WC Inc.*, 366 F.3d 981 (9th Cir. 2004) (order).

> *Cross-reference*: II.C (regarding the appealability of specific types of orders); VI (regarding bankruptcy appeals); VII (regarding agency and tax court appeals); IX (regarding constitutional limitations on federal jurisdiction).

A. APPEALS FROM FINAL DECISIONS (28 U.S.C. § 1291)

1. FINAL DECISIONS

a. Generally

Under 28 U.S.C. § 1291, the court of appeals has jurisdiction over "all final decision of the district courts . . . except where a direct review may be had in the Supreme Court." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981). Section 1291 has been interpreted to confer appellate jurisdiction over a district court decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (citations omitted). A district court decision may also be considered final where its result is that appellant is "effectively out of court." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 9 (1983) (citations omitted); *see also* *Blue Cross and Blue Shield of Alabama v. Unity Outpatient Surgery Center, Inc.*, 490 F.3d 718, 723-24 (9th Cir. 2007) (stating that "*Moses H. Cone* applies whenever there is a possibility that proceedings in another court could moot a suit or an issue, even if there is no guarantee that they will do so" and holding that "lengthy and indefinite stays place a plaintiff effectively out of court.").

The finality rule is to be given a "practical rather than a technical construction." *Stone v. Heckler*, 722 F.2d 464, 467 (9th Cir. 1983) (citation omitted); *see also* *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 n.9 (1974) ("[I]t is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality.") (citations omitted). For example, an order that does not end the litigation on the merits may nevertheless be

appealable under § 1291 if it satisfies the collateral order doctrine or is certified under Fed. R. Civ. P. 54(b).

> *Cross-reference*: II.A.2 (regarding the collateral order doctrine); II.A.3 (regarding orders certified under Fed. R. Civ. P. 54(b)).

i. Need to Consider Finality

The court of appeals must consider sua sponte whether an order is final and thus appealable under 28 U.S.C. § 1291. *See WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1135 (9th Cir. 1997) (en banc). Appellate jurisdiction can be challenged at any time, and objections to jurisdiction cannot be waived. *See Fiester v. Turner*, 783 F.2d 1474, 1475 (9th Cir. 1986); *see also Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073, 1074 n.1 (9th Cir. 2004) (stating that merits panel has independent duty to determine appellate jurisdiction, even where motions panel has previously denied motion to dismiss on jurisdictional grounds); *Fontana Empire Center, LLC v. City of Fontana*, 307 F.3d 987, 990 n.1 (9th Cir. 2002) (same).

ii. Policy Behind Final Judgment Rule

The foundation of the final judgment rule is the policy against piecemeal litigation. *See Catlin v. United States*, 324 U.S. 229, 233-34 (1945). Piecemeal appeals present the dangers of undermining the independence of the district judge, exposing litigants with just claims to the harassment and cost of successive appeals, and obstructing judicial efficiency. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). Finality determinations require a balancing of "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Stone v. Heckler*, 722 F.2d 464, 467 (9th Cir. 1983) (citations omitted).

The rules of finality are designed to create more certainty as to when an order is appealable. *See National Distrib. Agency v. Nationwide Mut. Ins. Co.*, 117 F.3d 432, 434 (9th Cir. 1997); *see also Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988) ("The time of appealability, having jurisdictional consequences, should above all be clear.").

b. Determining Finality

A district court's decision is final for purposes of 28 U.S.C. § 1291 "if it (1) is a full adjudication of the issues, and (2) 'clearly evidences the judge's intention that it be the court's final act in the matter.'" *Nat'l Distrib. Agency v. Nationwide Mut. Ins. Co.*, 117 F.3d 432, 433 (9th Cir. 1997) (citations omitted); *see also Way v. County of Ventura*, 348 F.3d 808, 810 (9th Cir. 2003); *Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 964 (9th Cir. 2003). "The purpose of § 1291 is to disallow appeal from any decision which is tentative, informal or incomplete." *Citicorp Real Estate, Inc. v. Smith*, 155 F.3d 1097, 1101 (9th Cir. 1998).

Appealability under § 1291 "is to be determined for the entire category to which a claim belongs," rather than according to the particular facts of a given case. *Digital Equip Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994); *see also Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 439-40 (1985) (concluding that "orders disqualifying counsel in civil cases, as a class, are not sufficiently separate from the merits to qualify for interlocutory appeal").

i. District Court Intent

A district court order is final only when it is clear that the judge intended it to be final. *See Nat'l Distrib. Agency v. Nationwide Mut. Ins. Co.*, 117 F.3d 432, 433 (9th Cir. 1997). "Evidence of intent consists of the [o]rder's content and the judge's and parties[']conduct." *Slimick v. Silva (In re Slimick)*, 928 F.2d 304, 308 (9th Cir. 1990) (citations omitted); *see also Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 964 (9th Cir. 2003) (concluding, based on the procedural history leading up to order, that the district court intended order to be final even though some of the claims were dismissed without prejudice). The focus is on the intended effect of the order, not the terminology used by the district court. *See Montes v. United States*, 37 F.3d 1347, 1350 (9th Cir. 1994) (holding that order dismissing "action" rather than "complaint" is not final if court's words and actions indicate an intent to grant plaintiff leave to amend). If it is clear that the district court intended to dispose of all the claims before it, abandoned claims will not compromise the finality of the judgment. *See Lovell v. Chandler*, 303 F.3d 1039, 1049 (9th Cir. 2002).

If a district court judgment is conditional or modifiable, the requisite intent to issue a final order is lacking. *See* *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 870-71 (9th Cir. 2004) (concluding dismissal order not final where no final judgment was entered, the district court reconsidered the dismissal order, and amended it after a motion to modify was filed; however, notice of appeal filed after subsequent dismissal order encompassed earlier non-final judgment); *Way v. County of Ventura*, 348 F.3d 808, 810 (9th Cir. 2003) (concluding order not final where district court invited party to file motions addressing qualified immunity); *Nat'l Distrib. Agency v. Nationwide Mut. Ins. Co.*, 117 F.3d 432, 433-34 (9th Cir. 1997) (concluding order was not final where it stated "the [c]ourt may amend or amplify this order with a more specific statement of the grounds for its decision"); *Zucker v. Maxicare Health Plans, Inc.*, 14 F.3d 477, 483 (9th Cir. 1994) (concluding judgment was not final where it stated it would become final only after parties filed a joint notice of the decision rendered in related state court action).

> *Cross-reference*: II.C.13 (regarding the appealability of dismissal orders generally).

ii. Adjudication of all Claims

An order disposing of fewer than all claims is generally not final and appealable unless it is certified for appeal under Fed. R. Civ. P. 54(b). *See* *Chacon V. Babcock*, 640 F.2d 221, 222 (9th Cir. 1981). But where a district court "obviously was not trying to adjudicate fewer than all the pleaded claims," the order may be treated as final. *Lockwood v. Wolf Corp.*, 629 F.2d 603, 608 (9th Cir. 1980) (concluding judgment was final where order granting summary judgment disposed of defendant's counterclaim, even though judgment did not mention the counterclaim).

> *Cross-reference*: II.A.3 (regarding certification under Fed. R. Civ. P. 54(b) of order disposing of fewer than all claims); III.C.3 (regarding when finalization of remaining claims cures a premature notice of appeal from fewer than all claims).

(a) Precise Damages Undetermined

Under certain circumstances, a judgment clearly establishing the rights and liabilities of the parties will be deemed final and appealable even though the precise amount of damages is not yet settled. *See* *Citicorp Real Estate, Inc. v. Smith*, 155 F.3d 1097, 1101 (9th Cir. 1998) (holding that foreclosure judgments conclusively determining liability for defaulted loans and identifying the property to be sold were final and appealable even though district court retained jurisdiction to hold defendants personally liable for any deficiency remaining after judicial foreclosure sale); *see also* *Pauly v. U.S. Dept. of Agric.*, 348 F.3d 1143, 1148 (9th Cir. 2003) (holding that district court order was final despite partial remand to Department of Agriculture for mechanical recalculation of recapture amount); *Gates v. Shinn*, 98 F.3d 463, 467 (9th Cir. 1996) (holding that post-judgment contempt order imposing sanctions for each day order violated was appealable even though amount of sanctions undetermined and ongoing); *Stone v. San Francisco*, 968 F.2d 850, 855 (9th Cir. 1992) (same).

> *Cross-reference*: II.C.10.b.ii (regarding a continuing contempt order issued after entry of judgment in underlying proceeding).

(b) Implicit Rejection of Claim or Motion

Under the "common sense" approach to finality, the court of appeals may in appropriate cases infer rejection of a claim or motion. *See* *Alaska v. Andrus*, 591 F.2d 537, 540 (9th Cir. 1979) (inferring rejection of claim where judgment did not expressly deny plaintiff's request for permanent injunctive relief, but prior court orders indicated that plaintiff's request had been denied); *see also* *Lovell v. Chandler*, 303 F.3d 1039, 1049-50 (9th Cir. 2002) (inferring rejection of claims where the claims were abandoned and it was clear the trial court intended to dispose of all claims before it); *Federal Ins. Co. v. Scarsella Bros., Inc.*, 931 F.2d 599, 601 (9th Cir. 1991) (inferring rejection of claims where they remained technically undecided, but decision "resolved all issues necessary to establish the legal rights and duties of the parties"); *United States Postal Serv. v. American Postal Workers Union*, 893 F.2d 1117, 1119 (9th Cir. 1990) (inferring denial of motion where district court's ruling on certain motions necessarily dictated outcome of others because "[a]ll parties had a clear understanding of the practical

effects of the judgment, and no prejudice results from construing the judgment as a final judgment" disposing of all motions).

(c) Apparent Attempt to Dispose of All Claims

Finality may also be found where a district court judgment appears to be "an attempt to dispose of all claims in the action" and "no practical benefits would accrue from a dismissal for lack of appellate jurisdiction." *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 719 (9th Cir. 1986) (concluding order was final where district court entered summary judgment for plaintiff on state law grounds, apparently believing it unnecessary to dispose of federal claims in light of well-established rule that courts should not reach federal constitutional issues where state law issues are dispositive); *see also French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902, 905 (9th Cir. 1986) (concluding order was final where district court confirmed in part and struck in part arbitrator's award of damages; construing order as "an attempt to dispose of all claims in the action" because plaintiff did not assert the right to have overturned damages award tried by district court).

(d) Discrepancy between Order and Judgment

A "technical variance between the judgment and order" does not render the order non-final. *Lockwood v. Wolf Corp.*, 629 F.2d 603, 608 (9th Cir. 1980) (concluding judgment was final where court stated in summary judgment order that counterclaim was barred, but neglected to mention counterclaim in judgment); *see also Johnson v. Meltzer*, 134 F.3d 1393, 1396 (9th Cir. 1998) (concluding judgment was final even though it omitted party's name where body of order clearly revealed court's intent to include party in its grant of summary judgment); *Perkin-Elmer Corp. v. Computervision Corp.*, 680 F.2d 669, 670-71 (9th Cir. 1982) (concluding judgment was final where district court entered judgment referring only to infringement following jury verdict on both patent infringement and validity).

(e) Scope of Underlying Action

Finality depends in part on the scope of the underlying action:

(1) Consolidated Actions

An order adjudicating all claims in one action is not final and appealable if consolidated actions remain undecided, absent a Fed. R. Civ. P. 54(b) certification. *See* *Huene v. United States*, 743 F.2d 703, 705 (9th Cir. 1984).

Cross-reference: II.C.9 (regarding consolidated actions.)

(2) Actions to Enforce or Compel

An order that would not be immediately appealable if issued in the course of an ongoing proceeding may be an appealable final judgment if it disposes of the only issue before the court. For example:

- In a proceeding to enforce an attorney's fee award under the Longshore and Harbor Workers' Compensation Act, an order dismissing without prejudice the petition to enforce is final and appealable. *See* *Thompson v. Potashnick Constr. Co.*, 812 F.2d 574, 575-76 (9th Cir. 1987).

- In a proceeding to compel arbitration, an order dismissing the petition to enforce is final and appealable. *See* *Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d 1524, 1528 (9th Cir. 1985).

  Cross-reference: II.C.4 (regarding arbitration orders).

- In a Freedom of Information Act ("FOIA") action, an order requiring the government to release documents, or denying plaintiff access to documents, is a final appealable order. *See* *United States v. Steele (In re Steele)*, 799 F.2d 461, 464-65 (9th Cir. 1986) (citations omitted) (stating that the order represents the "full, complete and final relief available" in FOIA action); *cf.* *Church of Scientology Int'l v. IRS*, 995 F.2d 916, 921 (9th Cir. 1993) (stating that an order holding that a

particular document is not exempt from disclosure under the attorney-client privilege is not a final appealable order if it does not also order the government to produce the documents).

Cross-reference: II.C.12.c.ii (regarding final judgment in discovery proceedings).

- In a proceeding involving the death of a prisoner, the plaintiffs sought discovery of the mortality review. The district court overruled claim of privilege and ordered the production of the document. Although the court did not decide "whether a discovery order disposing of an asserted claim of privilege could be independently appealed under the collateral order doctrine of *Cohen*[,]" the court determined that given the nature and importance of the privilege at issue the court had jurisdiction to review the district court's decision. *Agster v. Maricopa County*, 422 F.3d 836, 838-39 (9th Cir. 2005) (citation omitted).

c. Manufacturing Finality

"A significant concern in assessing finality is whether the parties have attempted to manipulate [] appellate jurisdiction." *American States Ins. Co. v. Dastar Corp.*, 318 F.3d 881, 885 (9th Cir. 2003); *see also James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1070 (9th Cir. 2002). Litigants ordinarily may not manipulate jurisdiction by manufacturing finality "without fully relinquishing the ability to further litigate unresolved claims." *Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073, 1077 (9th Cir. 1994). Permitting an appeal without prejudice to unresolved claims would lead to inefficient use of judicial resources. *See Cheng v. Commissioner*, 878 F.2d 306, 310 (9th Cir. 1989) (observing that court of appeals may have to unnecessarily decide an issue or refamiliarize itself with a case in the event of multiple appeals).

An agreement between the parties that grants the appellant the right to resurrect his remaining claims at a later point in time may evidence an attempt to manipulate jurisdiction. *See Adonican v City of Los Angeles*, 297 F.3d 1106, 1108 (9th Cir. 2002). The court has also found attempted manipulation of jurisdiction where the record showed the parties discussed their attempts to create appellate jurisdiction and the parties dismissed the remaining claims, even though there was

no explicit agreement to allow revival of the claims or waiver of the statute of limitations. *See* *American States Ins. Co. v. Dastar Corp.*, 318 F.3d 881, 885 (9th Cir. 2003).

Note that where an appeal is dismissed as a result of the parties' attempt to manufacture finality in a partial summary judgment order by dismissing other claims without prejudice, the appellant is not divested of the right to appeal. Rather, the appellant may seek the district court's permission to refile his claims as allowed under the agreement and proceed to trial, file a motion to dismiss the claims not covered by the partial summary judgment, or file a Rule 54(b) motion for the district court's determination. The parties will be able to seek appellate review once all the claims have been decided or the district court enters a Rule 54(b) final judgment. *See* *Adonican v. City of Los Angeles*, 297 F.3d 1106, 1108 (9th Cir. 2002).

> *Cross-reference*: II.C.13.b.vi (regarding impact of voluntary dismissal of unresolved claims on appealability of order adjudicating certain claims).

d. "Pragmatic" or "Practical" Finality Doctrine

i. Parameters of Doctrine

In rare cases, appellate jurisdiction has been found proper despite a lack of a final order where: (1) the order was "marginally final;" (2) it disposed of "an unsettled issue of national significance," (3) review of the order implemented the same policy Congress sought to promote in 28 U.S.C. § 1292(b); and (4) judicial economy would not be served by remand. *Southern Cal. Edison Co. v. Westinghouse Elec. Corp. (In re Subpoena Served on Cal. Pub. Util. Comm'n)*, 813 F.2d 1473, 1479-80 (9th Cir. 1987); *see also* *Nehmer v. U.S. Dept. of Agric.*, 494 F.3d 846, 856 n. 5 (9th Cir. 2007) (holding that the district court's order involved an unsettled issue of national significance, was marginally final, furthered the policy underlying 28 U.S.C. § 1292(b), and prevented harm further delay would cause).

> *Cross-reference*: II.B.4 (regarding interlocutory permissive appeals under § 1292(b)).

This "pragmatic finality" doctrine is a "narrow" exception to the finality requirement, *All Alaskan Seafoods, Inc. v. M/V Sea Producer*, 882 F.2d 425, 428 n.2 (9th Cir. 1989), to be used "sparingly," *Southern Cal. Edison Co.*, 813 F.2d at 1479.

ii. Applications

The court has applied the pragmatic finality doctrine in exercising jurisdiction over an appeal from a partial summary judgment for county employees in an action alleging violation of the Fair Labor Standards Act. *See Service Employees Int'l Union, Local 102 v. County of San Diego*, 60 F.3d 1346, 1349-50 (9th Cir. 1995) (concluding that although damages issue was not yet resolved, jurisdiction was proper because partial summary judgment orders were marginally final, disposed of unsettled issues of national significance, and remand would not promote judicial efficiency); *see also Pauly v. U.S. Dept. of Agric.*, 348 F.3d 1143, 1148 (9th Cir. 2003) (holding that district court order was final despite its partial remand to the United States Department of Agriculture for the mechanical recalculation of recapture amount).

The court has also applied the practical finality doctrine to exercise jurisdiction over appeal by Department of Veterans Affairs from two orders in which the district court, in a class action brought by veterans of the Vietnam War exposed to Agent Orange, granted motion for clarification and enforcement of consent decree and established procedure for processing claims of veterans with chronic lymphocytic leukemia. *See Nehmer v. U.S. Dept. Of Agric.*, 494 F.3d 846, 856 n. 5 (9th Cir. 2007) (holding that the district court's order involved an unsettled issue of national significance, was marginally final, furthered the policy underlying 28 U.S.C. § 1292(b), and prevented harm further delay would cause);

But see Way v. County of Ventura, 348 F.3d 808, 811 (9th Cir. 2003) (declining to apply "practical finality doctrine" where district court had not completed its qualified immunity analysis); *Sierra Club v. Department of Transp.*, 948 F.2d 568, 572 (9th Cir. 1991) (declining to apply "practical finality doctrine" in environmental action); *Williamson v. Unum Life Ins. Co. of Am.*, 160 F.3d 1247, 1250-51 (9th Cir. 1998) (declining to apply "practical finality doctrine" in insurance action).

2. COLLATERAL ORDER DOCTRINE

a. Generally

Under the collateral order doctrine, a litigant may appeal from a "narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system, nonetheless be treated as final." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (internal quotations and citations omitted); *see also* *Copley Press, Inc. v. Higuera-Guerrero (In re Copley Press, Inc.)*, 518 F.3d 1022, 1025 (9th Cir. 2008). The conditions for meeting the collateral order doctrine are "stringent." *Digital Equip. Corp.*, 511 U.S. at 868. Though often referred to as an exception, the collateral order doctrine is "best understood" as a "practical construction" of the final judgment rule. *Id.* at 867.

> *Cross-reference*: II.A.3 (regarding certification under Fed. R. Civ. P. 54(b) of an order disposing of fewer than all claims).

b. Requirements of Collateral Order Doctrine

To be immediately appealable, a collateral order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (citations omitted); *see also* *Copley Press, Inc. v. Higuera-Guerrero (In re Copley Press, Inc.)*, 518 F.3d 1022, 1025 (9th Cir. 2008); *Estate of Kennedy v. Bell Helicopter Textron, Inc.*, 283 F.3d 1107, 1110 (9th Cir. 2002); *Jeff D. v. Kempthorne*, 365 F.3d 844, 849 (9th Cir. 2004); *Stevens v. Brinks Home Security, Inc.*, 378 F.3d 944, 947 (9th Cir. 2004) (concluding that collateral order doctrine did not apply where the order did not resolve an "important" question). All three requirements must be satisfied to qualify as collateral order for the purpose of appeal. *See* *Cordoza v. Pacific States Steel Corp.*, 320 F.3d 989, 997 (9th Cir. 2003). The appealability of a collateral order should be determined "for the entire category to which a claim belongs." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (citations omitted) (concluding that "orders disqualifying counsel in civil cases, as a class, are not sufficiently separable from the merits to qualify for interlocutory appeal").

c. Appealability of Specific Orders under Collateral Order Doctrine

i. Abstention Orders

A district court's refusal to abstain is generally not appealable as a collateral order. *See* *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 278 (1988) (*Colorado River* doctrine). However, a district court's decision to abstain is appealable where the effect is to send the parties out of federal court. *See* *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 717 (1996) (*Burford* doctrine); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10-11 & n.11 (1983) (*Colorado River* doctrine).

> *Cross-reference*: II.C.13 (regarding abstention-based dismissals); II.C.24 (regarding abstention-based remands); II.C.26 (regarding abstention-based stays).

ii. Orders Denying Immunity

Orders denying claims of immunity are immediately appealable as collateral orders where the asserted immunity is an immunity from suit, not a mere defense to liability, *see* *Alaska v. United States*, 64 F.3d 1352, 1354-55 (9th Cir. 1995), and the appeal raises a question of law, *see* *Mitchell v. Forsyth*, 472 U.S. 511, 528-30 (1985). *See also* *Brittain v. Hansen*, 451 F.3d 982, 987 (9th Cir. 2006).

A district court's order deferring a motion to dismiss on absolute immunity grounds pending further discovery is not appealable under the collateral order doctrine. However, the court can "treat the notice of appeal as a petition for a writ of mandamus and consider the issues under the factors set forth in *Bauman*." *See* *Miller v. Gammie*, 335 F.3d 889, 894-95 (9th Cir. 2003) (en banc).

> *Cross-reference*: II.C.17 (regarding orders denying immunity).

iii. Disqualification of Counsel

An order granting a motion to disqualify counsel is generally not appealable as a collateral order. *See* *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 440 (1985). An order denying a motion to disqualify counsel is also generally unappealable as a collateral order. *See* *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 369-70 (1981). *See also* *Aguon-Schulte v. Guam Election Com'n*, 469 F.3d 1236, 1239 (9th Cir. 2006) (no jurisdiction to review denial of motions to strike appearances of private counsel).

Cross-reference: II.C.14 (regarding disqualification orders).

iv. Fed. R. Civ. P. 11 Sanctions

An order denying a motion for sanctions brought by a party to ongoing litigation is generally not appealable as a collateral order. *See* *McCright v. Santoki*, 976 F.2d 568, 569-70 (9th Cir. 1992) (per curiam) (observing the order can be effectively reviewed after final judgment). An order awarding sanctions against a party to ongoing litigation is similarly unappealable as a collateral order. *See* *Riverhead Sav. Bank v. National Mortgage Equity Corp.*, 893 F.2d 1109, 1113 (9th Cir. 1990) (observing that order can be effectively reviewed after final judgment). *See also* *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1055-56 (9th Cir. 2007) (holding that "pre-filing orders entered against vexatious litigants are [] not immediately appealable"); *Stanley v. Woodford*, 449 F.3d 1060 (9th Cir. 2006) (order awarding sanctions against attorney was not "final decision" for purposes of appeal).

Cross-reference: II.C.10 (regarding contempt and sanctions orders generally).

v. Other Orders

(a) Appealable Collateral Orders

Appeal from the following orders has been permitted under the collateral order doctrine:

- Order denying defendant's motion to require plaintiffs in shareholder derivative action to post security for costs of suit. *See* *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

- Protective order in habeas corpus proceedings limiting respondent's communications with certain witnesses. *See* *Wharton v. Calderon*, 127 F.3d 1201, 1204 (9th Cir. 1997).

- Order requiring warden to transport prisoner for medical tests. *See* *Jackson v. Vasquez*, 1 F.3d 885, 887-88 (9th Cir. 1993).

- Order granting motion for certificate of reasonable cause prior to dismissal of forfeiture action. *See* *United States v. One 1986 Ford Pickup*, 56 F.3d 1181, 1185-86 (9th Cir. 1995) (per curiam).

- A district court order denying the state's motion for reconsideration of a magistrate judge order that permitted discovery by the state of certain privileged materials, in connection with a habeas petitioner's claim of ineffective assistance of counsel, but limited the state's use of such materials, was appealable under the collateral order doctrine. *Osband v. Woodford*, 290 F.3d 1036, 1041 (9th Cir. 2002).

- A district court order dismissing with leave to amend a complaint under the Fair Labor Standards Act for failure to include the employees' true names is immediately appealable under the collateral order doctrine. *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1066-67 (9th Cir. 2000).

- Dismissal of claims under the *Rooker-Feldman* doctrine. *See* *Fontana Empire Ctr. v. City of Fontana*, 307 F.3d 987, 991-92 (9th Cir. 2002).

- A district court decision overruling a claim of privilege and ordering the production of materials, based on the specific circumstances of the case. The court determined that "significant strategic decisions turn on [the decision's] validity and review after final judgment may therefore come too late." *See* *Agster v. Maricopa County*, 422 F.3d 836, 838-39 (9th Cir. 2005) (internal quotation marks and citations omitted). *See also* *In re Napster, Inc. Copyright Litigation*, 479 F.3d 1078, 1087-89 (9th Cir. 2007).

(b) Orders Not Appealable as Collateral Orders

Appeal from the following orders has not been permitted under the collateral order doctrine:

- Order expunging lis pendens in forfeiture proceeding. *See* *Orange County v Hongkong & Shanghai Banking Corp.*, 52 F.3d 821, 824 (9th Cir. 1995).

  Cross-reference: II.C.5 (regarding appeal from orders related to assets).

- Order refusing to certify or decertifying a class. *See* *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467-69 (1978).

  Cross-reference: II.C.8.a (regarding permissive interlocutory appeal from class certification orders under Fed. R. Civ. P. 23(f)).

- Order granting motion to vacate dismissal entered pursuant to settlement agreement. *See* *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 869 (1994).

- Pretrial order requiring parties to deposit money into a fund to share costs of discovery. *See* *Lopez v. Baxter Healthcare Corp. (In re Baxter Healthcare Corp.)*, 151 F.3d 1148, 1148-49 (9th Cir. 1998)

(order) (observing that order was subject to ongoing modification by district court and even contained a refund provision).

- A district court order denying motion to issue a notice of collective action under the Fair Labor Standards Act. *See McElmurry v. U.S. Bank Nat'l Ass'n*, 495 F.3d 1136, 1138 (9th Cir. 2007).

3. ORDERS CERTIFIED UNDER FED. R. CIV. P. 54(b)

a. Generally

> When an action presents more than one claim for relief – whether as a claim, counterclaim, crossclaim, or third-party claim – or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.

Fed. R. Civ. P. 54(b).

Fed. R. Civ. P. 54(b) does not relax the finality requirement of 28 U.S.C. § 1291; it simply authorizes entry of judgment as to an individual claim or party, within a multi-claim or multi-party action, where the action as to an individual claim or party is finally determined. *See Arizona State Carpenters Pension Trust Fund v. Miller*, 938 F.2d 1038, 1039-40 (9th Cir. 1991); *Wood v. GCC Bend, LLC*, 422 F.3d 873 (9th Cir. 2005). An order adjudicating fewer than all claims against all parties is not subject to immediate review absent Rule 54(b) certification unless it satisfies the collateral order doctrine, see II.A.2, is an appealable interlocutory order, see II.B, or is inextricably intertwined with an order that is immediately appealable, see V.A (Scope of Appeal).

i. District Court Determinations

In determining whether to certify an order under Fed. R. Civ. P. 54(b), the district courts must first determine whether the order is a final judgment. *See Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7 (1980). "It must be a 'judgment' in the sense that it is a decision upon a cognizable claim for relief, and

it must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action'." *Id.* (citation omitted).

The district court must then determine whether there is any just reason for delay. *See id.* at 8. The court should consider: (1) the interrelationship of the certified claims and the remaining claims in light of the policy against piecemeal review; and (2) equitable factors such as prejudice and delay. *See id.* at 8-10; *Gregorian v. Izvestia*, 871 F.2d 1515, 1518-20 (9th Cir. 1989); *see also Wood v. GCC Bend, LLC*, 422 F.3d 873 (9th Cir. 2005).

The district court may sua sponte reconsider, rescind or modify a certified order under 54(b) until the appellate court grants a party permission to appeal. *See City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 886 (9th Cir. 2001).

ii. Appellate Court Review

In determining whether jurisdiction exists under Fed. R. Civ. P. 54(b), the court of appeals examines the contents of the certification order, see II.A.3.b (below), and the propriety of certification, see II.A.3.c.

b. Contents of Certification Order

i. "No Just Reason for Delay"

A certification order under Fed. R. Civ. P. 54(b) must expressly determine there is "no just reason for delay." *See* Fed. R. Civ. P. 54(b); *see also Nat'l Ass'n of Home Builders v. Norton*, 325 F.3d 1165, 1167 (9th Cir. 2003) (concluding the district court's initial certification was deficient because it failed to make the requisite express determination that there was "no just reason for delay"); *Frank Briscoe Co. v. Morrison-Knudsen Co.*, 776 F.2d 1414, 1416 (9th Cir. 1985) (dismissing appeal for lack of jurisdiction where certification order referred to Fed. R. Civ. P. 54(b), and directed entry of judgment, but did not expressly determine there was "no just reason for delay").

However, "Fed. R. Civ. P. 54(b) does not require that the district court use the rule's precise wording." *AFGE Local 1533 v. Cheney*, 944 F.2d 503, 505 n.3

(9th Cir. 1991) (determining Rule 54(b)'s "no just reason for delay" requirement was satisfied where certification order stated that defendant would not be prejudiced by entry of judgment under Rule 54(b), that certified claims were "substantially different" from remaining claims, and that defendant would not be subject to conflicting orders).

ii. Reference to Fed. R. Civ. P. 54(b)

It is not mandatory that a certification order expressly refer to Fed. R. Civ. P. 54(b) where the order finds no just reason for delay and directs entry of judgment. *See Bryant v. Technical Research Co.*, 654 F.2d 1337, 1341 n.3 (9th Cir. 1981).

iii. "Specific Findings" Supporting Certification

A certification order should also contain "specific findings setting forth the reason for [certification]." *Morrison-Knudsen Co. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981). However, the lack of specific findings is not a jurisdictional defect as long as the court of appeals can determine the propriety of certification without such findings. *See Alcan Aluminum Corp. v. Carlsberg Fin. Corp.*, 689 F.2d 815, 817 (9th Cir. 1982) (finding certification order valid where posture of case "readily obtainable from the briefs and records"); *see also Noel v. Hall*, 341 F.3d 1148, 1154 n.2 (9th Cir. 2003) (explaining that the court may "hear an interlocutory appeal under Rule 54(b) if it will aid in the efficient resolution of the action."); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 732 n.1 (1987) (noting that remand due to lack of Rule 54(b) findings would be a waste of judicial resources because parties briefed merits).

c. Propriety of Certification

i. Appellate Review Required

Where a district court certifies a decision for immediate appeal under Rule 54(b), the court of appeals must independently determine whether the decision is final. *See Arizona State Carpenters Pension Trust Fund v. Miller*, 938 F.2d 1038, 1039-40 (9th Cir. 1991). "The partial adjudication of a single claim is not appealable, despite a Rule 54(b) certification." *Id.* at 1040 (citation omitted) (concluding that order dismissing punitive damages claim was not certifiable under

Rule 54(b) because the damages claim was not separate and distinct from the remaining counts); *see also* *Wood v. GCC Bend, LLC*, 422 F.3d 873, 883 (9th Cir. 2005) (reversing the district court's Rule 54(b) certification).

ii. Standard of Review

The court of appeals reviews de novo the district court's evaluation of judicial concerns, such as the interrelationship of certified claims and remaining claims, and the possibility of piecemeal review. *See* *Gregorian v. Izvestia*, 871 F.2d 1515, 1518-19 (9th Cir. 1989) (mixed question of law and fact); *see also* *AmerisourceBergen Corp. v. Dialysis West, Inc.*, 465 F.3d 946, 949 (9th Cir. 2006) ("The district court's Rule 54(b) certification of the judgment is reviewed de novo to determine if it will lead to 'piecemeal appeals' and for 'clear unreasonableness' on the issue of equities."); *Wood v. GCC Bend, LLC*, 422 F.3d 873, 879 (9th Cir. 2005) (explaining that judicial concerns are reviewed de novo). The court of appeals reviews for abuse of discretion the district court's assessment of equitable factors, such as prejudice and delay. *See* *Gregorian*, 871 F.2d at 1519; *cf.* *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797 (9th Cir. 1991) (citing *Gregorian* for the single proposition that the court reviews a Rule 54(b) certification for abuse of discretion).

> *Cross-reference*: II.A.3.a.i (regarding determinations by the district court under Fed. R. Civ. P. 54(b)).

iii. Scrutiny under *Morrison-Knudsen*

The traditional view is that Fed. R. Civ. P. 54(b) is to be "reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties." *Morrison-Knudsen Co. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981). Where there exists a similarity of legal or factual issues between claims to be certified and claims remaining, certification is proper "only where necessary to avoid a harsh and unjust result." *Id.* at 965-66 (finding certification improper because certified claims were legally and factually inseverable from unadjudicated claims, and compelling circumstances were not present).

iv. Trend Toward Greater Deference to District Court

"The present trend is toward greater deference to a district court's decision to certify under Rule 54(b)." *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991) (noting that *Morrison-Knudsen* is "outdated and overly restrictive"); *see also Bingham v. City of Manhattan Beach*, 341 F.3d 939, 942 n.1 (9th Cir. 2003) (noting that the court grants deference to a district court's decision to grant a motion for entry of final judgment under Rule 54(b)); *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002) ("A court of appeals may, of course, review such judgments for compliance with the requirements of finality, but accords a great deference to the district court."). Under the more recent standard, certified claims need not be separate and independent from remaining claims; rather, a certification is appropriate if it will aid "expeditious decision" of the case. *See Texaco, Inc.*, 939 F.2d at 798 (stating that even under this more lenient standard, the court of appeals still must scrutinize certification to prevent piecemeal review).

(a) Orders Properly Certified under Fed. R. Civ. P. 54(b)

The court of appeals has determined that the district court did not err in certifying the following orders for immediate appeal under Fed. R. Civ. P. 54(b):

- Order granting partial summary judgment to defendants properly certified even though the order eliminated no parties and left open possibility of full recovery by plaintiff for both property damage and liability to third parties. *See Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1524-25 (9th Cir. 1987) ("[G]iven the size and complexity of this case, we cannot condemn the district court's effort to carve out threshold claims and thus streamline further litigation.").

- Order granting summary judgment to defendants on plaintiffs' claims seeking invalidation of settlement agreement properly certified even though defendants' counterclaim for breach of settlement agreement still pending. *See Sheehan v. Atlanta Int'l Ins. Co.*, 812 F.2d 465, 468

(9th Cir. 1987) (stating that certified claims need not be separate and independent).

- Order granting summary judgment for defendant on grounds that settlement agreement unenforceable properly certified even though defendant's counterclaim for breach of contract, which formed the basis for the purported settlement, was still pending. *See* *Texaco v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991) (concluding that although certified claims require proof of same facts as unadjudicated claims, resolution of legal issues on appeal will streamline ensuing litigation).

- Order granting partial summary judgment to defendants as to certain theories of recovery properly certified even though the order did not eliminate any parties or limit possible recovery by plaintiff. *See* *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1524-25 (9th Cir. 1987) (observing that Rule 54(b) demands "pragmatic approach focusing on severability and efficient judicial administration").

- Order setting aside default as to libel claim properly certified even though civil conspiracy and intentional infliction of emotional distress claims still pending. *See* *Gregorian v. Izvestia*, 871 F.2d 1515, 1518-20 (9th Cir. 1989) (finding libel claim to be distinct legally and factually from conspiracy claim, and "substantially different" legally and factually from emotional distress claim even though distress claim premised in part on libel).

- Order dismissing certain defendants for lack of personal jurisdiction properly certified even though claims against remaining defendants still pending. *See* *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1484 (9th Cir. 1993) (observing that jurisdictional issue was "unrelated" to other issues in case and immediate appeal would aid "expeditious decision").

- Order granting summary judgment to third party defendants on contribution claim properly certified even though multiple claims against multiple parties were still pending in Comprehensive

Environmental Response, Compensation and Liability Act (CERCLA) action. *See* *Cadillac Fairview/California, Inc. v. United States*, 41 F.3d 562, 564 n.1 (9th Cir. 1994) (noting trend toward greater deference to district court certification under Rule 54(b)).

- Jury verdict for defendants on plaintiffs' claims in complex anti-trust action properly certified even though defendants' counterclaims still pending because district court ordered separate trials on claims and counterclaims. *See* *Amarel v. Connell*, 102 F.3d 1494, 1499 n.1 (9th Cir. 1997).

(b) Orders Not Properly Certified under Fed. R. Civ. P. 54(b)

The court of appeals has determined that the following orders were not properly certified for immediate appeal under Fed. R. Civ. P. 54(b):

- Order dismissing punitive damages claim not certifiable because not separate and distinct from remaining counts. *See* *Arizona State Carpenters Pension Trust Fund v. Miller*, 938 F.2d 1038, 1040 (9th Cir. 1991) ("[C]omplaint asserting only one legal right, even if seeking multiple remedies for the alleged violation of that right, states a single claim for relief." (citations omitted)).

- Orders granting judgment notwithstanding the verdict and new trial as to issues relating to plaintiffs' respiratory and neurological injuries not certifiable because claims for negligence not finally determined. *See* *Schudel v. General Elec. Co.*, 120 F.3d 991, 994 (9th Cir. 1997), *abrogated on other grounds by* *Weisgram v. Marley Co.*, 528 U.S. 440 (2000) (emphasizing that plaintiffs alleged single claims for negligence, not separate claims for respiratory and neurological injuries).

- Order granting summary judgment on state common law claim and statutory claim to the extent the claims were based on constructive discharge theory because the case was routine, the facts on all claims and issues overlapped and successive appeals were inevitable. *See*

Wood v. GCC Bend, LLC, 422 F.3d 873, 883 (9th Cir. 2005) (explaining that the interests of "judicial administration counsel against certifying claims or related issues in remaining claims that are based on interlocking facts, in a routine case, that will likely lead to successive appeals.").

d. Immediate Appeal from Fed. R. Civ. P. 54(b) Order Required

An order certified under Rule 54(b) must be appealed immediately; it is not reviewable on appeal from final judgment. *See* *Williams v. Boeing Co.*, 681 F.2d 615, 616 (9th Cir. 1982) (order) (stating that time to appeal begins to run upon entry of judgment under Rule 54(b)); *see also* *Atchison, Topeka & Santa Fe Ry. Co. v. California State Bd. of Equalization*, 102 F.3d 425, 427 (9th Cir. 1996) (holding that where notice of appeal was not filed within 30 days of partial summary judgment certified under Rule 54(b), later appeal from modified partial summary judgment order was untimely because modification did not adversely affect appellant's interest in a material matter).

Cross-reference: II.A.3.b.iii (regarding specific findings required under Fed. R. Civ. P. 54(b); III.C.3.a (regarding effectiveness of notice of appeal filed after grant of partial summary judgment but before entry of Rule 54(b) certification); III.F.2.g (regarding impact of tolling motion on time to appeal from order certified under Rule 54(b)).

e. Denial of Rule 54(b) Certification

An order denying a request for certification under Rule 54(b) is not itself an appealable order. *See* *McCall v. Deeds*, 849 F.2d 1259, 1259 (9th Cir. 1988) (order). However, an order denying certification may be reviewed on appeal from final judgment. *See* *Blair v. Shanahan*, 38 F.3d 1514, 1522 (9th Cir. 1994) (concluding district court did not abuse its discretion in refusing to certify order granting plaintiff's request for declaratory judgment that statute was unconstitutional).

B. APPEALS FROM INTERLOCUTORY DECISIONS (28 U.S.C. § 1292)

1. INTERLOCUTORY INJUNCTIVE ORDERS (28 U.S.C. § 1292(a)(1))

a. Generally

The court of appeals has jurisdiction over appeals from interlocutory orders "granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1).

Section 1292(a)(1) is to be construed narrowly to encompass only appeals that "further the statutory purpose of permitting litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequence." *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981) (internal quotations and citations omitted).

Note that the court of appeals' denial of permission to appeal under 28 U.S.C. § 1292(b) does not preclude appeal under 28 U.S.C. § 1292(a). *See Armstrong v. Wilson*, 124 F.3d 1019, 1021 (9th Cir. 1997) (noting that interlocutory appeal under § 1292(b) is by permission while interlocutory appeal under § 1292(a) is by right); *see also Bates v. United Parcel Serv., Inc.*, 465 F.3d 1069, 1076 n.4 (9th Cir. 2006) ("When [the court has] jurisdiction pursuant to § 1229(a), litigants need not also meet the requirements of § 1229(b).").

b. Order Granting or Denying an Injunction

i. Explicit Grant or Denial or Injunction

An interlocutory order specifically granting or denying an injunction is appealable under 28 U.S.C. § 1292(a)(1) without a showing of irreparable harm. *See Paige v. California*, 102 F.3d 1035, 1038 (9th Cir. 1996) (involving appeal from grant of preliminary injunction); *Shee Atika v. Sealaska Corp.*, 39 F.3d 247, 248-49 (9th Cir. 1994) (involving appeal from denial of permanent injunction).

ii. Implicit Grant or Denial of Injunction

An order that does not expressly grant or deny an injunction may nevertheless be appealable under § 1292(a)(1) if it: (1) has the practical effect of denying an injunction; (2) could cause serious or irreparable harm; and (3) can only be "effectually challenged" by immediate appeal. *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981); *see also Negrete v. Allianz Life Ins. Co. of North America*, 523 F.3d 1091, 1097 (9th Cir. 2008); *Calderon v. United States Dist. Court*, 137 F.3d 1420, 1422 n.2 (9th Cir. 1998) (noting inconsistent decisions as to whether *Carson* requirements should apply only to orders denying injunctive relief, or to both orders denying injunctive relief and orders granting injunctive relief).

The substantial effect of the order, not its terminology, is determinative. *See Tagupa v. East-West Ctr., Inc.*, 642 F.2d 1127, 1129 (9th Cir. 1981) (finding denial of mandamus appealable where substantial effect was to refuse an injunction); *see also Negrete*, 523 F.3d at 1097; *United States v. Orr Water Ditch Co.*, 391 F.3d 1077, 1081 (9th Cir. 2004), *amended by* 400 F.3d 1117 (9th Cir. 2005) (finding stay order appealable where it was the functional equivalent of a preliminary injunction).

(a) Practical Effect of Order

To determine an order's practical effect, the court evaluates the order "in light of the essential attributes of an injunction." *See Orange County v. Hongkong & Shanghai Banking Corp.*, 52 F.3d 821, 825 (9th Cir. 1995). An injunction is an order that is: "(1) directed to a party, (2) enforceable by contempt, and (3) designed to accord or protect some or all of the substantive relief sought by a complaint in more than preliminary fashion." *Id.* (internal quotation marks and citation omitted).

Applying the above standard, the court of appeals has held an order expunging a lis pendens to be unappealable under § 1292(a)(1) because although a lis pendens may prevent transfer of property by clouding its title, it is not directed at a party and its not enforceable by contempt. *See Orange County*, 52 F.3d at 825-26. The court of appeals has also held that a district court's remand order vacating a final rule published by the National Marine Fisheries Service did not

have the practical effect of entering an injunction because the order was subject to interlocutory appeal and did not compel the service to take any action, but rather only prohibited the service from enforcing the rule as it was written. *See* *Alsea Valley Alliance v. Dept. of Commerce*, 358 F.3d 1181, 1184-86 (9th Cir. 2004). Additionally, the court of appeals has held that an order denying exclusion of female state inmates from a plaintiff class action did not have the practical effect of an injunction where the order did not grant or deny injunctive relief, even though it modified the composition of the plaintiff class. *See* *Plata v. Davis*, 329 F.3d 1101, 1105-07 (9th Cir. 2003). The denial of an ex parte seizure order has also been held not to have the practical effect of an injunction and thus was not appealable. *See* *In Re Lorillard Tobacco Co.*, 370 F.3d 982, 981-89 (9th Cir. 2004).

In contrast, the court has permitted appeal from an order directing a party to place assessments mistakenly paid to it by defendant in escrow pending resolution of the underlying lawsuit, *see* *United States v. Cal-Almond, Inc.*, 102 F.3d 999, 1002 (9th Cir. 1996), and an order granting summary judgment to the federal government where the district court's ruling that the government had until a certain date to publish regulations effectively denied plaintiff environmental groups' request for an injunction requiring publication by an earlier date, *see* *Oregon Natural Resources Council, Inc., v. Kantor*, 99 F.3d 334, 336-37 (9th Cir. 1996). Jurisdiction has been also found over an interlocutory appeal from the district court's order to continue for the duration of the Securities and Exchange Commission (SEC) securities fraud action, the temporary escrow of termination payments because the order was analogous to a preliminary injunction. *See* *SEC v. Gemstar TV Guide Intern., Inc.*, 401 F.3d 1031 (9th Cir. 2005). The court also determined that an order not denominated an injunction, but that barred the defendant from discussing settlement in parallel class litigation, was in substance an injunction and thus immediately appealable under § 1292(a)(1). *See* *Negrete v. Allianz Life Ins. Co. of North America*, 523 F.3d 1091, 1096-98 (9th Cir. 2008).

(b) Potential for Serious or Irreparable Harm

An order that has the practical effect of denying injunctive relief is not immediately appealable unless appellant demonstrates that serious or irreparable harm would otherwise result. *See* *Carson v. American Brands, Inc.*, 450 U.S. 79, 84, 87-89 (1981) (concluding order that had effect of denying injunction was

appealable where order deprived parties of right to compromise on mutually agreeable terms, including immediate restructuring of appellee's employment policies, potentially causing irreparable harm.)

(c) Effective Challenge Not Possible after Final Judgment

An order that has the effect of granting or denying injunctive relief is not immediately appealable if it can be effectively challenged after final judgment. *See* *Gamboa v. Chandler*, 101 F.3d 90, 91 (9th Cir. 1996) (en banc) (concluding orders that did not expressly grant or deny injunctive relief were not appealable despite injunctive effect because they could be effectively challenged following entry of final judgment).

c. Orders Modifying, Continuing, or Dissolving Injunction

i. Order Modifying Injunction

An order that substantially changes the terms of an injunction or alters the legal relations between the parties is appealable under 28 U.S.C. § 1292(a)(1) as an order modifying an injunction. *See* *Gon v. First State Ins. Co.*, 871 F.2d 863, 866 (9th Cir. 1989); *cf.* *Public Serv. Co. of Colorado v. Batt*, 67 F.3d 234, 236-37 (9th Cir. 1995) (dismissing appeal from order that enforced but did not modify injunction).

For example, the following orders are appealable under § 1292(a)(1) as orders modifying an injunction:

- Order directing insurance company to pay all legal defense costs as incurred modified prior injunction ordering payment of all legal defense costs except as to claims and claimants clearly not covered. *See* *Gon v. First State Ins. Co.*, 871 F.2d 863, 865-66 (9th Cir. 1989).

- Order requiring law firm to submit invoices for legal services to court for in camera review modified prior preliminary injunction freezing

all client's assets except for purposes of paying reasonable attorney's fees. *See* *FSLIC v. Ferm*, 909 F.2d 372, 373 (9th Cir. 1990).

- Order denying motion to modify consent decree, by eliminating special master provision and substituting magistrate judge, had injunctive effect of requiring defendants to continue paying special master fees or face contempt. *See* *Hook v. Arizona Dep't of Corrections*, 107 F.3d 1397, 1401 (9th Cir. 1997). *But see* *Thompson v. Enomoto*, 815 F.2d 1323, 1327 (9th Cir. 1987) (concluding that order appointing special master did not modify consent decree because appointment of master was implicitly contemplated by court's retention of jurisdiction to establish procedures for compliance).

- Order denying motion based on changed circumstances that occurred after the injunction was entered to modify or dissolve preliminary injunction that barred former employee from arbitrating his employment dispute before the American Arbitration Association. *See* *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1123-25 (9th Cir. 2005).

- Order where district court modified preliminary injunction after remand from prior appeal forcing Napster to disable its file transferring service until conditions were met that would achieve full compliance with the modified preliminary injunction. *See* *A&M Records, Inc. v, Napster*, 284 F.3d 1091, 1095 (9th Cir. 2002).

ii. Order Continuing Injunction

An order continues an injunction if the injunction would otherwise dissolve by its own terms. *See* *Public Serv. Co. of Colorado v. Batt*, 67 F.3d 234, 236-37 (9th Cir. 1995) (holding that an order "continuing" in force an existing injunction was not appealable as a modification or continuation order because the original injunction would have remained in effect by its own terms even without the order).

iii. Order Dissolving Injunction

An order that has the effect of dissolving a prior injunction is appealable under 28 U.S.C. § 1292(a)(1). *See* *Crawford v. Honig*, 37 F.3d 485, 486-87 (9th Cir. 1995) (holding that order granting summary judgment that had the effect of vacating a modification to a prior injunction was appealable as an order dissolving an injunction).

iv. Order Denying Modification or Dissolution of Injunction

An order denying a motion to modify or dissolve an injunction is appealable only if the motion raised new matter not considered at the time of the original injunction. *See* *Gon v. First State Ins. Co.*, 871 F.2d 863, 865-66 (9th Cir. 1989); *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1419 n.4 (9th Cir. 1984). The purpose of 28 U.S.C. § 1292(a)(1) is "to permit review of orders made in response to claims of changed circumstances, not to extend indefinitely the time for appeal from preliminary injunction by the simple device of seeking to vacate it or modify it." *Sierra On-Line, Inc.*, 739 F.2d at 1419 n.4 (citations omitted).

Review of an order denying a motion to modify or dissolve an injunction is generally limited to "new matter" presented by the motion. *See* *Gon*, 871 F.2d at 866. However, an order granting a modification may bring up for review the original injunction if the court of appeals "perceives a substantial abuse of discretion or when the new issues raised on reconsideration are inextricably intertwined with merits of the underlying order." *Id.* (citation omitted).

Cross-reference: V (regarding the inextricably intertwined standard).

d. Examples of Orders Appealable under 28 U.S.C. § 1292(a)(1)

The following interlocutory orders are appealable under 28 U.S.C. § 1292(a)(1):

i. Order Granting Permanent Injunction

An order granting a permanent injunction is appealable under § 1292(a)(1) where no final judgment has yet been entered. *See* *Marathon Oil Co. v. United States*, 807 F.2d 759, 763-64 (9th Cir. 1986) (reviewing permanent injunction that was not a final judgment because the district court retained jurisdiction to conduct an accounting); *see also* *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 984 (9th Cir. 2007) (reviewing permanent injunction where district court retained jurisdiction only for an accounting of damages); *Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d 1075, 1079 (9th Cir. 2004) (stating that the court of appeals has jurisdiction over interlocutory appeal from district court order granting permanent injunction); *TWA v. American Coupon Exch.*, 913 F.2d 676, 680 (9th Cir. 1990) (reviewing permanent injunction that was not a final judgment because the district court retained jurisdiction to determine damages).

ii. Order Denying Entry of Consent Decree

An order denying a joint motion to enter a consent decree is appealable under § 1292(a)(1) where the order has the effect of denying injunctive relief and possibly causing irreparable harm. *See* *Carson v. American Brands, Inc.*, 450 U.S. 79, 87-90 (1981) (finding possibility of irreparable harm in denial of parties' right to compromise on mutually agreeable terms, including immediate restructuring of appellee's employment policies); *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1353 (9th Cir. 1990).

iii. Order Granting Injunction Despite Lack of Motion for Interim Relief

An order explicitly commanding a party to act or not act at the present time is sufficiently injunctive in character to be appealable under § 1292(a)(1) even though no motion for preliminary injunction is filed. *See* *United States v. Gila Valley Irrigation Dist.*, 31 F.3d 1428, 1441 (9th Cir. 1994) (reviewing order that specifically directed a party to allow river water to flow undiverted).

iv. Order Requiring Submission of Remedial Plan

An order requiring submission of a remedial plan is appealable under § 1292(a)(1) where the order sufficiently specifies the content and scope of the remedial scheme, and the plan ultimately submitted would not materially alter the issues presented to the court of appeals. *See* *Armstrong v. Wilson*, 124 F.3d 1019, 1022 (9th Cir. 1997) (noting that resolution of purely legal question presented would not be altered by details of remedial plan).

v. Certain Orders Affecting Assets

Certain orders affecting assets are appealable under § 1292(a)(1). *See, e.g.,* *SEC v. Hickey*, 322 F.3d 1123, 1128 n.1 (9th Cir. 2003), *amended by* 335 F.3d 834 (9th Cir. 2003) (exercising jurisdiction over order freezing assets of real estate brokerage); *United States v. Cal-Almond, Inc.*, 102 F.3d 999, 1002 (9th Cir. 1996) (exercising jurisdiction over order directing plaintiff to place assessments in escrow pending resolution of enforcement proceeding); *United States v. Roth*, 912 F.2d 1131, 1133 (9th Cir. 1990) (exercising jurisdiction over order freezing assets from sale of property pending trial in forfeiture action); *FSLIC v. Ferm*, 909 F.2d 372, 373 (9th Cir. 1990) (exercising jurisdiction over order requiring accounting that modified prior preliminary injunction freezing client's assets except for payment of reasonable attorney's fees); *Smith v. Eggar*, 655 F.2d 181, 183-84 (9th Cir. 1981) (exercising jurisdiction over order specifically commanding compliance with terms of security agreement between IRS and taxpayer that had resulted in consent order discontinuing taxpayer's motion for preliminary injunction).

> *Cross-reference*: II.C.5 (regarding the appealability of assets orders generally).

vi. Order Denying Relief in Mandamus Action

An order denying relief in a mandamus action is appealable where the order has the "substantial effect" of denying injunctive relief. *See* *Tagupa v. East-West Ctr., Inc.*, 642 F 2.d 1127, 1129 (9th Cir. 1981) (reviewing order granting partial summary judgment to federal defendants, thereby denying plaintiff's request for writ of mandamus directing those defendants to carry out their duties).

vii. Order Staying Extradition

An order staying extradition of a death row inmate to another state is appealable because it has the injunctive effect of restraining a party on penalty of contempt from taking an action it could otherwise take. *See* *Calderon v. United States Dist. Court*, 137 F.3d 1420, 1421-22 & n.2 (9th Cir. 1998).

viii. Order Denying Stay of Immigration Removal Order

A district court order denying a stay of removal pending resolution of a habeas corpus petition was tantamount to denial of interim injunctive relief. *See* *Faruqi v. Dept. of Homeland Sec.*, 360 F.3d 985, 988-89 (9th Cir. 2004) (order).

e. Examples of Orders Not Appealable under 28 U.S.C. § 1292(a)(1)

An order relating only to "conduct or progress of litigation before th[e] court ordinarily is not considered an injunction" under § 1292(a)(1). *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988) (overruling *Enlow-Ettelson* doctrine); *Gon v. First State Ins. Co.*, 871 F.2d 863, 865-66 (9th Cir. 1989) (stating that although they are enforceable by contempt, orders that regulate the course of litigation, such as discovery orders, are not immediately appealable as injunctions).

The following orders are not appealable under 28 U.S.C. § 1292(a)(1):

i. Order Denying Motion to Abstain

An order denying motion to stay or dismiss an action pursuant to the *Colorado River* doctrine is not appealable under 28 U.S.C. § 1291 or §1292(a)(1). *See* *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 277-78 (1988).

> *Cross-reference*: II.A.2.c.i (regarding the appealability of abstention orders generally).

ii. Order Denying Motion for Stay

An order denying motion to stay foreclosure proceeding not appealable because it could be effectively reviewed after final judgment in the very proceeding appellant sought to stay. *See* *Federal Land Bank v. L.R. Ranch Co.*, 926 F.2d 859, 864 (9th Cir. 1991).

> *Cross-reference*: II.C.26 (regarding the appealability of stay orders generally).

iii. Order Granting *England* Reservation of Jurisdiction

An order granting an *England* reservation of jurisdiction to decide federal claims in conjunction with a *Pullman* stay is not appealable because it does not have the practical effect of an injunction. *See* *Confederated Salish v. Simonich*, 29 F.3d 1398, 1406 (9th Cir. 1994) (noting that order granting stay under *Pullman* is appealable under § 1291 or § 1292(a)(1)).

iv. Order Denying Motion to Quash

An order denying a motion to quash a subpoena for documents is not appealable. *See* *United States v. Ryan*, 402 U.S. 530, 534 (1971) (concluding order was not an injunction even though it contained a clause directing subject of subpoena to seek permission from Kenyan authorities to obtain documents).

> *Cross-reference*: II.C.12.b.ii.(a) (regarding the appealability of orders denying motions to quash subpoena generally).

v. Order Granting Conditional Permissive Intervention

An order granting conditional permissive intervention is not appealable, despite its possible injunctive effect, because the order can be effectively challenged after final judgment. *See* *Stringfellow v. Concerned Neighbors In Action*, 480 U.S. 370, 379 (1987) (stating order is also unappealable under the collateral order doctrine).

Cross-reference: II.C.19 (regarding the appealability of intervention orders generally).

vi. Certain Orders Affecting Assets

Certain orders affecting assets are appealable under § 1292(a)(1). *See, e.g.*, *SEC v. Hickey*, 322 F.3d 1123, 1128 n.1 (9th Cir. 2003) (exercising jurisdiction over order freezing assets of real estate brokerage); *United States v. Cal-Almond, Inc.*, 102 F.3d 999, 1002 (9th Cir. 1996) (exercising jurisdiction over order directing plaintiff to place assessments in escrow pending resolution of enforcement proceeding); *United States v. Roth*, 912 F.2d 1131, 1133 (9th Cir. 1990) (exercising jurisdiction over order freezing assets from sale of property pending trial in forfeiture action); *FSLIC v. Ferm*, 909 F.2d 372, 373 (9th Cir. 1990) (exercising jurisdiction over order requiring accounting that modified prior preliminary injunction freezing client's assets except for payment of reasonable attorney's fees); *Smith v. Eggar*, 655 F.2d 181, 183-84 (9th Cir. 1981) (exercising jurisdiction over order specifically commanding compliance with terms of security agreement between IRS and taxpayer that had resulted in consent order discontinuing taxpayer's motion for preliminary injunction).

Cross-reference: II.C.5 (regarding the appealability of assets orders generally).

vii. Order Remanding to Federal Agency

An order granting remand to an agency for reconsideration of a consent decree is not appealable because it does not have the practical effect of granting or denying an injunction. *See United States v. Louisiana-Pacific Corp.*, 846 F.2d 43, 44-45 (9th Cir. 1988) (determining that order was also unappealable under the collateral order doctrine). Moreover, an order denying a motion for partial summary judgment seeking injunctive relief is not appealable where the district court simultaneously remands to an agency to conduct a hearing pursuant to newly enacted regulations that formed the basis for the summary judgment motion. *See Eluska v. Andrus*, 587 F.2d 996, 1001-02 (9th Cir. 1978).

Cross-reference: II.C.24.b (regarding the appealability of orders remanding to federal agencies generally).

viii. Order Denying Summary Judgment Due to Factual Disputes

An order denying a motion for summary judgment seeking a permanent injunction is not appealable where the motion was denied because of unresolved issues of fact. *See* *Switzerland Cheese Assoc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 24 (1966).

ix. Order Denying Entry of Consent Decree Not Appealable by Party Against Whom Injunction Sought

An order denying a joint motion for entry of a consent decree awarding injunctive relief is not appealable by the party against whom the injunction had been sought. *See* *EEOC v. Pan Am. World Airways, Inc.*, 796 F.2d 314, 316-17 (9th Cir. 1986) (per curiam).

f. Temporary Restraining Order

An order denying a temporary restraining order ("TRO") is generally not appealable because of the policy against piecemeal review. *See* *Religious Tech. Ctr. v. Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989).

However, an order denying a TRO may be appealable if it is tantamount to denial of a preliminary injunction, *see* *id.*, or if it "effectively decide[s] the merits of the case," *Graham v. Teledyne-Continental Motors*, 805 F.2d 1386, 1388 (9th Cir. 1987). "The terminology used to characterize the order does not control whether appeal is permissible under § 1292." *Northern Stevedoring & Handling Corp. v. International Longshoremen's & Warehousemen's Union*, 685 F.2d 344, 347 (9th Cir. 1982).

i. Order Tantamount to Denial of Preliminary Injunction

Appeal from the following orders has been permitted under § 1292(a)(1) because the orders are tantamount to denial of a preliminary injunction:

- Order denying a TRO after a full adversary hearing appealable where without review appellants would be foreclosed from pursuing further interlocutory relief. *See* *Environmental Defense Fund, Inc. v. Andrus*, 625 F.2d 861, 862 (9th Cir. 1980) (containing no reference to § 1292(a)(1)).

- Order denying a TRO after a non-evidentiary adversary hearing appealable where the judge determined that prior case law precluded the requested relief. *See* *Religious Tech. Ctr. v. Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989) ("The futility of any further hearing was . . . patent.").

- Order denying a TRO despite showing of irreparable harm appealable where parties had stipulated that order be treated as denial of preliminary injunction for appeal purposes. *See* *Contract Serv. Network, Inc. v. Aubry*, 62 F.3d 294, 296-97 (9th Cir. 1995) (involving an order denying a TRO based on lack of federal preemption).

- Order dissolving a TRO appealable where TRO had extended beyond 20-day limit set by Fed. R. Civ. P. 65 and was imposed after adversary hearing. *See* *Bowoon Sangsa Co. v. Micronesian Indus. Corp. (In re Bowoon Sangsa Co.)*, 720 F.2d 595, 597 (9th Cir. 1983).

- Order labeled as a TRO precluding employer from seeking to enforce non-compete agreement was appealable preliminary injunction, rather than unappealable TRO, because order was issued for 30 days, three times the limit set by Fed. R. Civ. P. 65 and both parties had opportunity to argue the merits of the order. *See* *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 804 (9th Cir. 2002).

ii. Orders Effectively Deciding Merits of Case

Appeal from the following orders has been permitted under § 1292(a)(1) because the orders effectively decide the merits of the case:

- Order denying a TRO appealable where application for permanent relief would be futile and, absent an injunction, controversy would become moot. *See* *Graham v. Teledyne-Continental Motors*, 805 F.2d 1386, 1388 (9th Cir. 1987) (holding denial of TRO to be a de facto denial of permanent injunction because if the federal agency were allowed to examine engines of crashed planes without observers, the claim that the exam may destroy evidence would be mooted).

- Order denying a TRO appealable where "denial of all relief was implied in the trial judge's denial of a temporary restraining order." *See* *Miller v. Lehman*, 736 F.2d 1268, 1269 (9th Cir. 1984) (per curiam) (reviewing denial of TRO based on district court's erroneous application of claim preclusion).

- Order denying a TRO to stay execution of inmate immediately appealable as de facto denial of permanent injunction. *See* *Woratzeck v. Arizona Bd. of Executive Clemency*, 117 F.3d 400, 401 (9th Cir. 1997) (per curiam).

- Order granting a TRO to enforce an arbitrator's decision appealable where TRO definitively stated rights of parties. *See* *Northern Stevedoring & Handling Corp. v. International Longshoremen's & Warehousemen's Union*, 685 F.2d 344, 347 (9th Cir. 1982) (reviewing TRO premised on determination that union could not honor picket line because, under labor agreement, it was not a bona fide picket line).

g. Mootness

An appeal from an order denying a preliminary injunction is mooted by entry of final judgment. *See* *SEC v. Mount Vernon Mem'l Park*, 664 F.2d 1358, 1361 (9th Cir. 1982).

An appeal from an order granting a preliminary injunction is similarly mooted by entry of permanent injunction. *See* *Planned Parenthood v. Arizona*, 718 F.2d 938, 949 (9th Cir. 1983).

Cross-reference: IX.B (regarding mootness generally).

2. INTERLOCUTORY RECEIVERSHIP ORDERS (28 U.S.C. § 1292(a)(2))

The court of appeals has jurisdiction over appeals from interlocutory orders "appointing receivers or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property." 28 U.S.C. § 1292(a)(2).

Section 1292(a)(2) is to be strictly construed to permit interlocutory appeals only from orders that fall within one of the three categories specifically set forth. *See* *FTC v. Overseas Unlimited Agency, Inc.*, 873 F.2d 1233, 1235 (9th Cir. 1989); *SEC v. American Principals Holdings, Inc.*, 817 F.2d 1349, 1351 (9th Cir. 1987) (stating that the statute was intended to cover orders that refuse to take steps to accomplish purpose of receivership). *See also* *SEC v. Capital Consultants, LLC*, 453 F.3d 1166, 1169 n.2 (9th Cir. 2006) (per curiam).

Appeal from the following orders has not been permitted under § 1292(a)(2):

- Order directing that funds be turned over to receiver pursuant to previous unappealed order appointing receiver. *See* *Overseas Unlimited Agency, Inc.*, 873 F.2d at 1235 (noting that a simple "turnover" order is also not appealable as an injunction under § 1292(a)(1)).

- Order affirming compensation payments to receiver and authorizing spinoff of some partnerships not appealable because it took steps towards winding up receivership rather than refusing to take such steps. *See* *American Principals Holdings, Inc.*, 817 F.2d at 1350-51.

- Order denying motion to dismiss receivership. *See* *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1214 (9th Cir. 1987).

3. INTERLOCUTORY ADMIRALTY ORDERS (§ 1292(a)(3))

a. Generally

The court of appeals has jurisdiction over appeals from interlocutory orders "determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." 28 U.S.C. § 1292(a)(3).

Section 1292(a)(3) is to be construed narrowly to confer jurisdiction "only when the order appealed from determines the rights and liabilities of the parties." *Seattle-First Nat'l Bank v. Bluewater Partnership*, 772 F.2d 565, 568 (9th Cir. 1985) (observing that the statute was intended to permit appeal from an admiralty court's determination of liability before action was referred to commissioner for damages determination); *see also Southwest Marine Inc. v. Danzig*, 217 F.3d 1128, 1136 (9th Cir. 2000).

To be appealable, an interlocutory admiralty order need not determine rights and liabilities as to all parties. *See All Alaskan Seafoods, Inc. v. M/V Sea Producer*, 882 F.2d 425, 427 (9th Cir. 1989) (exercising jurisdiction even though claims between other parties unresolved); *see also Seattle-First Nat'l Bank v. Bluewater Partnership*, 772 F.2d 565, 568 (9th Cir. 1985) (stating that certification under Fed R. Civ. P. 54(b) is not necessary to appeal an interlocutory admiralty order).

b. Appealable Admiralty Orders

Appeal from the following orders has been permitted under § 1292(a)(3):

- Order limiting cargo carrier's liability to set dollar amount pursuant to bill of lading and federal statute. *See Vision Air Flight Serv., Inc. v. M/V Nat'l Pride*, 155 F.3d 1165, 1168 (9th Cir. 1998).

- Order determining that crewmen held preferred wage liens on maritime equipment appealable because it eliminated any possibility of recovery by equipment owner. *See Kesselring v. F/T Arctic Hero*,

30 F.3d 1123, 1125 (9th Cir. 1994) (noting it was undisputed that proceeds of sale of vessel were insufficient to satisfy all claims).

- Order determining that one claimant's lien had priority over another appealable because it precluded possibility of recovery by subordinate lien holder where unpaid balance of preferred lien exceeded sale proceeds of vessel. *See All Alaskan Seafoods, Inc. v. M/V Sea Producer*, 882 F.2d 425, 427 (9th Cir. 1989) (distinguishing *Seattle-First Nat'l Bank v. Bluewater Partnership*, 772 F.2d 565, 568 (9th Cir. 1985)).

- Order confirming sale of vessel appealable. *See Ghezzi v. Foss Launch & Tug Co.*, 321 F.2d 421, 422 (9th Cir. 1963) (§ 1292(a)(3) not specifically mentioned).

- Order holding that contract relating to a written employment agreement that was not signed by the vessel's master was invalid. *See Harper v. United States Seafoods LP*, 278 F.3d 971, 973 (9th Cir. 2002).

- Order granting partial summary judgment limiting cruise line's liability in wrongful death action. *See Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 833-34 (9th Cir. 2002).

c. Nonappealable Admiralty Orders

Appeal from the following orders has not been permitted under § 1292(a)(3):

- Order determining priority of certain liens not appealable because challenge to trustee status of priority lien holder still pending, thereby precluding finality of lien priority determination as to any claimant. *See Seattle-First Nat'l Bank v. Bluewater Partnership*, 772 F.2d 565, 568 (9th Cir. 1985).
- Order staying action pending arbitration not appealable under § 1292(a)(3) because it did not determine rights and liabilities of

parties. *See* *Gave Shipping Co., S.A. v. Parcel Tankers, Inc.*, 634 F.2d 1156, 1157 (9th Cir. 1980).

4. INTERLOCUTORY PERMISSIVE APPEALS (28 U.S.C. § 1292(b))

A district judge may certify a nonappealable order in a civil action if it "involves a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

The court of appeals has discretion to permit an appeal from a certified order if a petition for permission to appeal is filed within 10 days after entry of the order in district court. *See* 28 U.S.C. § 1292(b); *see also* Fed. R. App. P. 5(a)(3) (stating that if the district court amends its order "to include the required permission or statement . . . the time to petition runs from entry of the amended order").

a. Procedure for Appeal under 28 U.S.C. § 1292(b)

i. District Court Certification under § 1292(b)

The district court must certify an order for immediate appeal before the court of appeals has discretion to accept jurisdiction under § 1292(b). *See* *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474 (1978); *Pride Shipping Corp. v. Tafu Lumber Co.*, 898 F.2d 1404, 1406 (9th Cir. 1990) (finding no appellate jurisdiction under § 1292(b) where district court refused to certify order). "[M]andamus to direct the district judge to exercise his discretion to certify [a] question is not an appropriate remedy." *Arthur Young & Co. v. United States Dist. Court*, 549 F.2d 686, 698 (9th Cir. 1977).

ii. Timely Petition from Order Certified under § 1292(b)

The requirement that a petition be filed with the court of appeals within ten days of entry of a certified order in district court is jurisdictional. *See* *Benny v. England (In re Benny)*, 791 F.2d 712, 719 (9th Cir. 1986) (dismissing appeal because petition untimely). However, if an appeal is dismissed as untimely under

§ 1292(b), the district court may recertify the order. *See* *Bush v. Eagle-Picher Indus., Inc. (In re All Asbestos Cases)*, 849 F.2d 452, 453 (9th Cir. 1988) (dismissing initial appeal without prejudice to refiling following recertification).

iii. Appellate Court Permission to Appeal under § 1292(b)

Once an order is certified, the petitioner "has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978) (citation omitted).

The court of appeals may decline to review an order certified under § 1292(b) for any reason, including docket congestion. *See* *Coopers & Lybrand*, 437 U.S. at 475. For example, the court of appeals has discretion to consider tactical use of certain motions as grounds for declining jurisdiction under § 1292(b). *See* *Shurance v. Planning Control Int'l Inc.*, 839 F.2d 1347, 1348-49 (9th Cir. 1988) (order) (remarking that permitting appeal from order denying motion to disqualify opposing counsel "would greatly enhance [its] usefulness as tactical ploy").

Once the court of appeals has granted permission to appeal under § 1292(b), it may subsequently determine that permission was improvidently granted and dismiss the appeal. *See* *Crow Tribe of Indians v. Montana*, 969 F.2d 848, 848-49 (9th Cir. 1992) (order) (dismissing appeal after permission granted because sole issue raised on appeal had been addressed by court in prior decision); *Bush v. Eagle-Picher Indus., Inc. (In re All Asbestos Cases)*, 849 F.2d 452, 453-54 (9th Cir. 1988) (dismissing appeal after permission granted because intervening Supreme Court decision clarified that appellate jurisdiction rested in the Federal Circuit).

Note that "a denial of permission to appeal under § 1292(b) does not foreclose appeal under § 1292(a), where a litigant can meet the requirements of § 1292(a)." *Armstrong v. Wilson*, 124 F.3d 1019, 1021 (9th Cir. 1997) (noting that interlocutory appeal under § 1292(b) is by permission while interlocutory appeal under § 1292(a) is by right).

iv. Stay Pending Appeal from Certified Order

An application for permissive appeal "shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." 28 U.S.C. § 1292(b).

b. Standards for Evaluating § 1292(b) Certification Order

The court of appeals must determine whether the district court properly found that the statutory requirements for certification had been met, and if so, whether the court wishes to accept jurisdiction. *See* *Arizona v. Ideal Basic Indus. (In re Cement Antitrust Litig.)*, 673 F.2d 1020, 1026 (9th Cir. 1982).

i. Order Raises Controlling Question of Law

To be appealable under § 1292(b), an order must involve a controlling question of law. *See* 28 U.S.C. § 1292(b). A question of law is controlling if its resolution on appeal "could materially affect the outcome of litigation in the district court." *Arizona v. Ideal Basic Indus. (In re Cement Antitrust Litig.)*, 673 F.2d 1020, 1026 (9th Cir. 1982).

A question may be controlling even though its resolution does not determine who will prevail on the merits. *See* *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 318-19 (9th Cir. 1996) (concluding order involved controlling question of law where "it could cause the needless expense and delay of litigating an entire case in a forum that has no power to decide the matter"). However, a question is not controlling simply because its immediate resolution may promote judicial economy. *See* *Ideal Basic Indus.*, 673 F.2d at 1027.

ii. Difference of Opinion Exists as to Controlling Question

To permit appeal under § 1292(b), there must be substantial ground for difference of opinion as to the question raised. *See* *Arizona v. Ideal Basic Indus. (In re Cement Antitrust Litig.)*, 673 F.2d 1020, 1026 (9th Cir. 1982); *see also* *Crow Tribe of Indians v. Montana*, 969 F.2d 848, 848-49 (9th Cir. 1992) (concluding

permission to appeal was improvidently granted where question raised was clearly answered in prior decision).

iii. Immediate Appeal Would Materially Advance Litigation

An order is not reviewable under § 1292(b) unless its immediate review may materially advance the litigation. *See* 28 U.S.C. § 1292(b). Although "material advancement" has not been expressly defined, in one case the court determined that immediate appeal would not materially advance the ultimate termination of litigation where the appeal might postpone the scheduled trial date. *See Shurance v. Planning Control Int'l, Inc.*, 839 F.2d 1347, 1348 (9th Cir. 1988).

c. Examples of Orders Reviewed under 28 U.S.C. § 1292(b)

The court of appeals has permitted appeal from the following orders under § 1292(b):

- Order denying motion for judgment on the pleadings contending that court of appeals had exclusive subject matter jurisdiction under federal statute. *See Owner-Operators Indep. Drivers Assoc. of Am., Inc. v. Skinner*, 931 F.2d 582, 584 (9th Cir. 1991).

- Order denying motion to remand for judgment on the pleadings contending that district court lacked jurisdiction due to untimely complaint. *See Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1171-72 (9th Cir. 1986), *amended by* 815 F.2d 570 (9th Cir. 1987).

- Order denying motion to remand for lack of subject matter jurisdiction. *See Goldberg v. CPC Int'l, Inc.*, 678 F.2d 1365, 1366 (9th Cir. 1982).

- Order denying summary judgment based on choice of law determination. *See Schoenberg v. Exportadora de Sal, S.A.*, 930 F.2d 777, 779 (9th Cir. 1991).

- Orders determining liability in a bifurcated, multidistrict, multiparty action. *See* *Steering Comm. v. United States*, 6 F.3d 572, 575 & n.1 (9th Cir. 1993) (finding mixed questions of law and fact to be within scope of appeal).

- Order granting motion to stay proceedings pending arbitration based on determination that employment contract contained enforceable arbitration provision. *See* *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 318 (9th Cir. 1996).

- Order requiring attorney to answer deposition questions despite assertion of privilege. *See* *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 338 (9th Cir. 1996).

- Order denying motion to dismiss in breach of contract action on grounds that guarantees made within the contract were illegal due to an executive order that prohibits United States citizens from investing in and trading with Iran. *See* *Bassidji v. Goe*, 413 F.3d 928, 932 (9th Cir. 2005).

d. Examples of Orders Not Reviewed under § 1292(b)

The court of appeals has not permitted appeal under § 1292(b) from the following orders:

- Order denying motion to disqualify opposing counsel for ethical violations. *See* *Shurance v. Planning Control Int'l, Inc.*, 839 F.2d 1347, 1348 (9th Cir. 1988) (observing that review would not affect outcome of litigation because if attorney tried to use evidence unethically obtained, appellant could seek protective order or exclusion of evidence). *But see* *Trust Corp. of Montana v. Piper Aircraft Corp.*, 701 F.2d 85, 88 (9th Cir. 1983) (permitting review of order denying motion to disqualify counsel).

- Order granting motion to recuse presiding judge based on interpretation of conflict in interest statute. *See* *Arizona v. Ideal Basic Indus. (In re Cement Antitrust Litig.)*, 673 F.2d 1020, 1026 (9th Cir.

1982) (concluding that reversal of such an order would not materially advance outcome of case because issue was collateral).

- Order remanding action to state court under 28 U.S.C. § 1447(c) due to lack of subject matter jurisdiction; review barred by § 1447(d). *See* *Krangel v. General Dynamics Corp.*, 968 F.2d 914, 915-16 (9th Cir. 1992) (per curiam) (noting that a discretionary remand order may be reviewable under §1292(b)).

- Order dismissing one of several defendants for lack of personal jurisdiction was not appealable because the district court did not indicate in the order that immediate appeal would advance termination of litigation. *See* *Special Investments, Inc. v. Aero Air, Inc.*, 360 F.3d 989, 993 n.1 (9th Cir. 2004).

C. APPEALABILITY OF SPECIFIC ORDERS

1. ADMIRALTY

See II.B.3.

2. AGENCY

See VII.

3. APPOINTMENT OF COUNSEL

a. Generally

An order denying a motion for appointment of counsel is generally not an appealable final order. *See* *Kuster v. Block*, 773 F.2d 1048, 1049 (9th Cir. 1985) (holding that order denying appointment of counsel in 42 U.S.C. § 1983 action was not appealable); *see also* *Wilborn v. Escalderon*, 789 F.2d 1328, 1332 & n.2 (9th Cir. 1986) (reviewing denial of appointed counsel after final judgment). Such an order does not satisfy the collateral order doctrine because it raises issues enmeshed with the merits of the underlying action. *See* *Kuster*, 773 F.2d at 1049

(reasoning that entitlement to counsel depends on merit of claim and litigant's ability to articulate claim in light of complexity of issues).

b. Appointment of Counsel in Title VII Action

An order denying appointment of counsel in a Title VII action is an appealable collateral order. *See* *Bradshaw v. Zoological Soc'y of San Diego*, 662 F.2d 1301, 1305 (9th Cir. 1981) (observing that denial of counsel in a Title VII case is not 'inherently tentative,' the court can avoid delving into the merits by relying on an agency determination of reasonable cause, and immediate review is necessary to prevent plaintiff from becoming bound in a future action by prejudicial errors). "Congress has made explicit findings that Title VII litigants are presumptively incapable of handling properly the complexities involved in Title VII cases." *Wilborn v. Escalderon*, 789 F.2d 1328, 1332 n.2 (9th Cir. 1986) (harmonizing *Kuster and Bradshaw*).

However, an order denying an interim award of attorney's fees to pay appointed counsel in a Title VII action is not immediately appealable. *See* *Morgan v. Kopecky Charter Bus Co.*, 760 F.2d 919, 920-21 (9th Cir. 1985) (distinguishing Bradshaw).

> *Cross-reference*: II.C.15 (regarding forma pauperis status); II.C.22 (regarding pre-filing review orders); II.C.6 (regarding attorney's fees).

4. ARBITRATION (9 U.S.C. § 16)

In cases governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.), the appealability of arbitration orders is established by 9 U.S.C. § 16 (formerly 9 U.S.C. § 15). *See* *Nichols v. Stapleton*, 877 F.2d 1401, 1403 (9th Cir. 1989) (applying provisions retroactively).

Under 9 U.S.C. § 16, decisions disfavoring arbitration (*e.g.* orders denying motions to compel arbitration) are generally immediately appealable, while decisions favoring arbitration (*e.g.* orders compelling arbitration) are generally not appealable until after arbitration proceedings have concluded. *See* David D. Siegel, Practice Commentary, 9 U.S.C. § 16; *see also* *Sanford v. Memberworks,*

Inc., 483 F.3d 956, 960-61 (9th Cir. 2007); *Dees v. Billy*, 394 F.3d 1290, 1291-92 (9th Cir. 2005); *Bushley v. Credit Suisse First Boston*, 360 F.3d 1149, 1153 (9th Cir. 2004); *O.P.C. Farms Inc. v. Conopco Inc.*, 154 F.3d 1047, 1048-49 (9th Cir. 1998); *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1302 (9th Cir. 1994). However, dismissal in favor of arbitration is an appealable final decision, notwithstanding that the dismissal is in favor of arbitration and the parties could later return to court to enter judgment on an arbitration award. *See Green Tree Financial Corp.-Alabama v. Randalph*, 531 U.S. 79, 89 (2000).

a. Cases Governed by the Federal Arbitration Act

"The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, authorize[s] courts to enforce agreements to arbitrate statutory claims." *Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153, 1155 n.2 (9th Cir. 1998).

A provision of the Federal Arbitration Act excluding from its reach "contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate commerce" did not exclude all employment contracts, but rather exempted from the FAA only contracts of employment law that restricted the ability of non-transportation employees and employers to enter into an arbitration agreement. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001), *abrogating Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1998).

Regarding the coverage of the Federal Arbitration Act, *see also* 9 U.S.C. § 1 *et seq.*; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

b. Arbitration Orders Appealable under 9 U.S.C. § 16

The following orders (interlocutory orders disfavoring arbitration and final arbitration orders) are appealable under 9 U.S.C. § 16:

- Order refusing to stay an action pending arbitration under 9 U.S.C. § 3. *See* 9 U.S.C. § 16(a)(1)(A); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1138 (9th Cir. 1991).

- Order denying a petition to order arbitration to proceed under 9 U.S.C. § 4. *See* 9 U.S.C. § 16(a)(1)(B); *Three Valleys Mun. Water Dist.*, 925 F.2d at 1138.

- Order denying an application to compel arbitration under 9 U.S.C. § 206. *See* 9 U.S.C. § 16(a)(1)(C); *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1207 (9th Cir. 1998); *Britton v. Co-Op Banking Group*, 4 F.3d 742, 744 (9th Cir. 1993).

- Order confirming or denying confirmation of an award or partial award. *See* 9 U.S.C. § 16(a)(1)(D).

- Order modifying, correcting, or vacating an award. *See* 9 U.S.C. § 16(a)(1)(E).

- Interlocutory order granting, continuing, or modifying injunction against arbitration. *See* 9 U.S.C. § 16(a)(2); *Southeast Resource Recovery Facility Auth. v. Montenay Int'l Corp.*, 973 F.2d 711, 712 (9th Cir. 1992) (exercising jurisdiction over order staying arbitration).

- Final decision with respect to an arbitration subject to Title 9. *See* 9 U.S.C. § 16(a)(3); *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1302 (9th Cir. 1994).

c. Arbitration Orders Not Appealable under 9 U.S.C. § 16

Whether an order favoring arbitration is interlocutory, and thus not immediately appealable, depends on the scope of the proceeding in which the order is issued. *See* below ("Interlocutory v. Final Arbitration Decision"). The following orders favoring arbitration are not immediately appealable under 9 U.S.C. § 16 when they are interlocutory:

- Interlocutory order staying action pending arbitration under 9 U.S.C. § 3. *See* 9 U.S.C. § 16(b)(1); *Delta Computer Corp. v. Samsung Semiconductor & Telecomm. Co.*, 879 F.2d 662, 663 (9th Cir. 1989); *see also Dees v. Billy*, 394 F.3d 1290, 1294 (9th Cir. 2005) (holding

that "a district court order staying judicial proceedings and compelling arbitration is not appealable even if accompanied by an administrative closing. An order administratively closing a case is a docket management tool that has no jurisdictional effect.").

- Interlocutory order directing arbitration to proceed under 9 U.S.C. § 4. *See* 9 U.S.C. § 16(b)(2); *Nichols v. Stapleton*, 877 F.2d 1401, 1403 (9th Cir. 1989) (per curiam).

- Interlocutory order compelling arbitration under 9 U.S.C. § 206. *See* 9 U.S.C. § 16(b)(3); *Delta Computer Corp.*, 879 F.2d at 663.

- Interlocutory order refusing to enjoin an arbitration subject to Title 9. *See* 9 U.S.C. § 16(b)(4); *Pacific Reinsurance Mgt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1022 (9th Cir. 1991).

d. Interlocutory v. Final Decision

Whether an order favorable to arbitration is immediately appealable depends on whether the order is an interlocutory or a final order. *See* David D. Siegel, Practice Commentary, 9 U.S.C. § 16.

For example, an order appointing an arbitrator is unappealable if issued in the course of an ongoing proceeding. *See O.P.C. Farms Inc. v. Conopco Inc.*, 154 F.3d 1047, 1048-49 (9th Cir. 1998).

In contrast, an order compelling arbitration is a final decision appealable under 9 U.S.C. § 16(a)(3) if the motion to compel arbitration was the only claim before the district court. *See Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1302 (9th Cir. 1994) (referring to a proceeding solely to compel arbitration as an "independent" proceeding). An action solely to compel arbitration is an "independent" proceeding regardless of any related proceeding pending before a state court. *See id*; *see also Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1105 (9th Cir. 2003).

An order dismissing an action remains a "final decision" within the traditional understanding of that term, notwithstanding that the dismissal was in

favor of arbitration and that the parties could later return to court to enter judgment on an arbitration award. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 86-87 (2000).

A district court's order dismissing an action without prejudice after it determines that one of the plaintiff's causes of action fails to state a claim, and ordering that parties arbitrate the remaining claims, is final and appealable. *Interactive Flight Techs., Inc. v. Swiss Air Transp. Co.*, 249 F.3d 1177, 1179 (9th Cir. 2001) (order), *overruling* *McCarthy v. Providential Corp.*, 122 F.3d 1242 (9th Cir. 1997). However, a district court order staying judicial proceedings and compelling arbitration where not all claims are dismissed is not appealable. *See* *Dees v. Billy* 394 F.3d 1290, 1294 (9th Cir. 2005); *see also* *Ventress v. Japan Airlines*, 486 F.3d 1111, 1119 (9th Cir. 2007) (district court's interlocutory order compelling arbitration was not appealable because the district court stayed the case pending arbitration); *Sanford v. Memberworks, Inc.*, 483 F.3d 956, 961 (9th Cir. 2007) (district court order compelling arbitration not final and appealable where the court did not dismiss the claims, but rather said "it would terminate the case" if arbitration not completed in twelve months); *Bushley v. Credit Suisse First Boston*, 360 F.3d 1149, 1153 (9th Cir. 2004) (district court order compelling arbitration was not final and appealable where the court did not rule upon defendant's motions to stay and dismiss, effectively staying the action pending the conclusion of arbitration).

e. Other Avenues for Appeal from Arbitration Orders

Title 9 does not preclude permissive appeals pursuant to 28 U.S.C. § 1292(b). *See* 9 U.S.C. § 16(b); *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1186 (9th Cir. 1998) (reviewing order compelling arbitration under § 1292(b)), *overruled on other grounds by* *E.E.O.C. v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003) (en banc); *see also* *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1138 (9th Cir. 1991).

> *Cross-reference*: II.B.4 (regarding interlocutory permissive appeals under § 1292(b) generally).

An order compelling arbitration may also be reviewable if it is "inextricably bound up" with an order over which the court of appeals has jurisdiction. *See*

Tracer Research Corp. v. National Envtl. Servs. Co., 42 F.3d 1292, 1294 (9th Cir. 1994) (reviewing order compelling arbitration in appeal from order dissolving injunction under 28 U.S.C. § 1292(a)(1)). *But see* *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1379 & n.5 (9th Cir. 1997) (noting that U.S. Supreme Court has yet to affirm validity of exercising appellate jurisdiction over related rulings that are not supported by an independent jurisdictional basis).

Cross-reference: V.A.2 (regarding the reviewability of an order compelling arbitration in an interlocutory injunction appeal).

5. Assets (Liens, Attachments, etc.)

a. Orders Restraining Assets

Ordinarily, an interlocutory order restraining assets is not immediately appealable because the rights of the parties can be protected during the proceeding. *See* *PMS Distrib. Co. v. Huber & Suhner, A.G.*, 863 F.2d 639, 640 (9th Cir. 1988).

For example, the following interlocutory orders restraining assets are not immediately appealable:

- Order granting writ of attachment. *See* *Perpetual Am. Bank, FSB v. Terrestrial Sys., Inc.*, 811 F.2d 504, 505-06 (9th Cir. 1987).

- Order denying motion to quash writ of execution. *See* *Steccone v. Morse-Starrett Prods. Co.*, 191 F.2d 197, 199 (9th Cir. 1951); *see also* *United States v. Moore*, 878 F.2d 331 (9th Cir. 1989) (per curiam).

- Order granting writ of possession. *See* *PMS Distrib. Co.*, 863 F.2d at 640.

b. Orders Releasing Assets

Ordinarily, an interlocutory order releasing assets is immediately appealable under the collateral order doctrine because review after final judgment would be an "empty rite." *PMS Distrib. Co. v. Huber & Suhner, A.G.*, 863 F.2d 639, 640 (9th Cir. 1988) (citations omitted). *But see Orange County v. Hong Kong & Shanghai Banking Corp.*, 52 F.3d 821, 823-24 (9th Cir. 1995) (holding that order expunging lis pendens is not an appealable collateral order where "the determination of whether the claimant has established the probable validity of his real property claim will thrust th[e] court into the merits of the dispute").

For example, the following interlocutory orders releasing assets are immediately appealable under the collateral order doctrine:

- Order vacating writ of attachment. *See Swift & Co. Packers v. Compania Columbiana Del Caribe*, 339 U.S. 684, 688-89 (1950); *Pride Shipping Corp. v. Tafu Lumber Co.*, 898 F.2d 1404, 1406 (9th Cir. 1990); *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 630 (9th Cir. 1982).

- Order vacating writ of garnishment. *See Stevedoring Serv. of Am. v. Ancora Transp., N.V.*, 59 F.3d 879, 881 (9th Cir. 1995).

- Order vacating right to attach order. *See Interpool Ltd. v. Char Yigh Marine (Panama) S.A.*, 890 F.2d 1453, 1457-58 (9th Cir. 1989), *amended by* 918 F.2d 1476 (9th Cir. 1990).

6. ATTORNEY'S FEES

a. Interim Attorney's Fees Order

Generally, an order granting or denying interim attorney's fees is not immediately appealable, either as a collateral order or as an injunction. *See Rosenfeld v. United States*, 859 F.2d 717, 720 (9th Cir. 1988); *see also In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Litigation*,

401 F.3d 143, 156 (9th Cir. 2005); *cf.* *Finnegan v. Director, Office of Workers' Compensation Progs.*, 69 F.3d 1039, 1041 (9th Cir. 1995).

For example, the following orders granting or denying interim attorney's fees are not immediately appealable:

- Order awarding interim attorney's fees under 42 U.S.C. § 1988. *See* *Hillery v. Rushen*, 702 F.2d 848, 848 (9th Cir. 1983).

- Order denying interim attorney's fees under Title VII. *See* *Morgan v. Kopecky Charter Bus Co.*, 760 F.2d 919, 920-21 (9th Cir. 1985) (finding no jurisdiction over order that denied motion for reasonable fee from public fund to pay involuntarily appointed counsel).

  Cross-reference: II.C.3.b (regarding appointment of counsel in Title VII actions).

- Order awarding interim attorney's fees under the Freedom of Information Act. *See* *Rosenfeld*, 859 F.2d at 720.

- Order awarding interim attorney's fees after class action settlement. *See* *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Litigation*, 401 F.3d at 156-61.

b. Post-Judgment Attorney's Fees Order

An order granting or denying a post-judgment motion for attorney's fees is generally an appealable final order. *See* II.C.21.c.i (Post-Judgment Orders).

7. BANKRUPTCY

See VI.

8. CLASS ACTIONS

a. Interlocutory Appeal from Class Certification Order

A district court order designating a lead plaintiff in a securities fraud class action brought under the Private Securities Litigation Reform Act was not subject to interlocutory review. *Z-Seven Fund, Inc. v. Motorcar Parts & Accessories*, 231 F.3d 1215, 1219 (9th Cir. 2000).

i. Fed. R. Civ. P. 23

> A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 10 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Fed. R. Civ. P. 23(f).

Regarding the procedure for seeking permissive appeal, *see* Fed. R. App. P. 5.

ii. Decisions Predating Fed. R. Civ. P. 23(f)

An order refusing to certify, or decertifying, a class is generally not an appealable collateral order. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467-69 (1978) (reasoning that such an order is subject to revision, enmeshed with the merits, and effectively reviewable after final judgment). Moreover, an order denying class certification was deemed unappealable as a denial of an injunction where plaintiff sought only a permanent injunction, not a preliminary injunction. *See Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478, 479-81 & n.3 (1978) (distinguishing case where class certification denied in conjunction with denial of preliminary injunction).

Cross-reference: II.D.4.a (regarding mandamus relief from class certification orders).

b. Review of Class Certification Order After Final Judgment

Cross-reference: V.A.1 (regarding decisions that are reviewable on appeal from final judgment under the merger doctrine).

i. Final Order Adjudicating Individual Claim

Ordinarily, an order decertifying a class, or declining to certify a class, is reviewable on appeal from a final judgment as to individual claims. *See* *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978).

ii. Dismissal Following Settlement of Individual Claim

However, an interlocutory order denying class certification is not reviewable after final judgment where the named plaintiff voluntarily dismissed the entire action with prejudice after settling his individual claims. *See* *Seidman v. Beverly Hills*, 785 F.2d 1447, 1448 (9th Cir. 1986) (observing in dictum that "[h]ad the stipulation narrowly provided for dismissal of [plaintiff's] individual claims, and then had the district court, having earlier denied class certification, entered an adverse judgment dismissing the entire action, an entirely different scenario would be before us").

Cross-reference: II.C.13.b.vi (regarding voluntary dismissal with prejudice).

iii. Dismissal for Failure to Prosecute Individual Claim

An order denying class certification does not merge in the final judgment of dismissal for failure to prosecute where the denial of certification led to abandonment of suit. *See* *Huey v. Teledyne, Inc.*, 608 F.2d 1234, 1240 (9th Cir. 1979).

Cross-reference: II.C.13.b.iv (regarding dismissal for failure to prosecute).

iv. Underlying Judgment Reversed on Appeal

As a general rule, "interlocutory orders regarding certification and decertification of class actions should not be reviewed [by the court of appeals] . . . when the judgment pursuant to which appeal was taken is reversed or vacated and the case remanded." *Weil v. Investment/Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 27 (9th Cir. 1981).

c. Appeal from Orders Allocating Cost of Notifying Class Members

Orders allocating costs of notifying class members are generally appealable collateral orders. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172 & n.10 (1974) (order imposing costs of notification on defendants appealable); *see also Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 348 n.8 (1978) (order requiring defendants, partially in their own expense, to compile a list of members of the plaintiff class appealable); *Harris v. Peddle (In re Victor Tech. Sec. Litig.)*, 792 F.2d 862, 863-64 (9th Cir. 1986) (order requiring plaintiffs to offer to reimburse record owners of stock for costs of forwarding notice to beneficial owners appealable).

9. Consolidated Actions

A decision adjudicating all claims in an action is not final and appealable if consolidated actions remain undecided, unless the order is certified under Fed. R. Civ. P. 54(b). *See Huene v. United States*, 743 F.2d 703, 704 (9th Cir. 1984).

Cross-reference: II.A.3 (regarding orders certified under Fed. R. Civ. P. 54(b)).

However, if after a notice to appeal is filed in a consolidated action the remaining actions are resolved, or proper Rule 54(b) certification is obtained, the

court of appeals has jurisdiction over the appealed action. *See* *Fadem v. United States*, 42 F.3d 533, 534-35 (9th Cir. 1994) (order).

Cross-reference: III.C (regarding premature notices of appeal).

10. Contempt and Sanctions

The appealability of a contempt or sanctions order depends on whether the order is issued: (1) in the course of an underlying district court proceeding, *see* II.C.10.a; (2) after final judgment in an underlying district court proceeding, *see* II.C.10.b; or (3) as the final judgment in an enforcement or contempt proceeding, *see* II.C.10.c.

In addition to these procedural considerations, which are explicated below, an order of contempt is generally not appealable until sanctions are imposed, *see* *Blalock Eddy Ranch v. MCI Telecomms. Corp.*, 982 F.2d 371, 373 (9th Cir. 1992), and an order awarding sanctions is not appealable until the amount of sanctions is determined, *see* *Jensen Elec. Co. v. Moore, Caldwell, Rowland & Dodd, Inc.*, 873 F.2d 1327, 1329 (9th Cir. 1989). *But see* II.C.10.b.ii (regarding continuing contempt orders).

a. Appealability of Contempt or Sanctions Order Issued in the Course of an Underlying District Court Proceeding

The appealability of a contempt or sanctions order issued in the course of an underlying district court proceeding depends on whether the order issued against: (1) a party, *see* II.C.10.a.i; (2) a nonparty, *see* II.C.10.a.ii; or (3) a party and nonparty jointly, *see* II.C.10.a.iii.

i. Contempt or Sanctions Order Against Party

The appealability of a contempt or sanctions order issued against a party to ongoing proceedings depends on whether the order is civil or criminal, *see* below.

(a) Appealability of Civil v. Criminal Contempt Orders

An order of civil contempt entered against a party to ongoing litigation is generally not immediately appealable. *See* *Bingman v. Ward*, 100 F.3d 653, 655 (9th Cir. 1996); *accord* *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 859 F.2d 681, 687 (9th Cir. 1988) (order of civil contempt against parties for violating preliminary injunction not reviewable even during appeal under § 1292(a)(1) challenging constitutionality of preliminary injunction). *But see* *Kirkland v. Legion Ins. Co.*, 343 F.3d 1135, 1140 (9th Cir. 2003) (holding that civil contempt order was appealable because it was based on district court's prior order which was sufficiently final to be appealable); *Dollar Rent A Car of Washington, Inc. v. Travelers Indem. Co.*, 774 F.2d 1371, 1376 (9th Cir. 1985) ("[A]n appeal of a civil contempt order is permissible when it is incident to an appeal from a final order or judgment, including an underlying preliminary injunction order.").

However, an order of criminal contempt entered against a party to ongoing litigation is immediately appealable. *See* *Bingman*, 100 F.3d at 655(monetary sanctions against defendant prison officials).

In determining whether a contempt sanction is civil or criminal, the court of appeals looks to the character of the relief granted, not the terminology used by the district court. *See* *id.* at 656.

See also *Koninklijke Philips Electronics N.V. v. KXD Technology, Inc.*, 539 F.3d 1039, 1042 (9th Cir. 2008).

(b) Criminal Contempt Defined

An unconditional penalty is generally criminal because it is designed to punish. *See* *Bingman v. Ward*, 100 F.3d 653, 656 (9th Cir. 1996)

A fine is generally deemed punitive only when paid to the court, but where the purpose is clearly not compensatory, even a fine paid to complainant should be considered criminal. *See* *id.* at 655-56 (fine against defendant prison officials, payable in part to the plaintiff prisoner and in part to clerk of court, deemed criminal where judge stated purpose was to punish prison officials and did not

indicate fines were compensatory or could be expunged; clause stating one purpose of order was "to encourage adherence to this or other orders of [the] Court" did not alone convert sanctions into civil).

(c) Civil Contempt Defined

A fine is deemed civil if its purpose is to compensate the complainant for losses sustained, or to compel the contemnor to comply with the court's order by affording an opportunity to purge. *See* *Union of Prof'l Airmen v. Alaska Aeronautical Indus.*, 625 F2d 881, 883 (9th Cir. 1980) (fine deemed civil, even though it was a substantial round sum payable immediately, where it included damages and attorney's fees payable to opposing party for purposes of compensation and compliance); *see also* *Hoffman v. Beer Drivers & Salesmen's Local Union*, 536 F.2d 1268, 1272 (9th Cir. 1976) (order assessing fines against party and then suspending them to permit purge of contempt was adjudication of civil contempt).

Incarceration for the purpose of coercing compliance is also generally deemed civil, although it may become criminal if it loses its coercive effect due to contemnor's inability to comply. *See* *SEC v. Elmas Trading Corp.*, 824 F.2d 732, 732-33 (9th Cir. 1987) (deeming incarceration for failure to account for funds and produce records related to assets civil where purpose was to coerce party to comply); *Hughes v. Sharp*, 476 F.2d 975, 975 (9th Cir. 1973) (per curiam) (deeming incarceration for failure to appear at examination of judgment debtor civil where party given opportunity to purge contempt). It is within the district court's discretion to determine whether a civil contempt order has lost its coercive effect with regard to a particular contemnor. *See* *Elmas Trading Corp.*, 824 F.2d at 732-33 (district court did not abuse discretion in finding contemnor able to comply despite his assertion to the contrary).

(d) Sanctions Order against Party

An order awarding sanctions against a party is generally not an appealable collateral order because it can be effectively reviewed after final judgment. *See* *Riverhead Sav. Bank v. National Mortgage Equity Corp.*, 893 F.2d 1109, 1113 (9th Cir. 1990) (Rule 11 sanctions); *see also* *Molski v. Evergreen Dynasty Corp.*, 500

F.3d 1047, 1056 (9th Cir. 2007) (concluding that pre-filing orders entered against vexatious litigants are generally not immediately appealable).

ii. Contempt or sanctions Order against Nonparty

(a) Generally

A contempt or sanctions order against a nonparty is final and appealable by the nonparty upon issuance of the order despite lack of a final judgment in the underlying action. *See* *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 877 F.2d 787, 788, 790 (9th Cir. 1989) (order of civil contempt against nonparty for violation of preliminary injunction appealable); *David v. Hooker Ltd.*, 560 F.2d 412, 415-17 (9th Cir. 1977) (sanctions order awarding expenses and attorney's fees against nonparty officer of corporate defendant under Fed. R. Civ. P. 37(b)(2) for failure to answer interrogatories appealable). *But see* *Jensen Elec. Co. v. Moore, Caldwell, Rowland & Dodd, Inc.*, 873 F.2d 1327, 1329 (9th Cir. 1989) (order awarding sanctions against nonparty attorney for filing frivolous third party complaint not final and appealable where amount of sanctions not yet determined); *cf.* *In re Dyer*, 322 F.3d 1178, 1186-87 (9th Cir. 2003) (court of appeals had jurisdiction to review district court decision on merits, as well as further decision that bankruptcy court's attorney fee award was excessive, even though district court had remanded for additional findings on the appropriate fee award).

(b) Contempt or Sanctions Order against Nonparty Witness

An order of civil contempt entered against a nonparty witness for failure to comply with a subpoena for documentary evidence is appealable despite lack of a final judgment in the underlying action. *See* *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988).

(c) Contempt or Sanctions Order against Nonparty Attorney

Prior to *Cunningham v. Hamilton County*, 527 U.S. 198, 210 (1999), an order awarding sanctions against a nonparty attorney in an ongoing proceeding was

generally immediately appealable by the attorney under the collateral order doctrine. *See e.g.* *Reygo Pac. Corp. v. Johnston Pump Co.*, 680 F.2d 647, 648 (9th Cir. 1982) (reviewing order sanctioning attorney for filing motion to compel that was not substantially justified under Fed. R. Civ. P. 37(a)(4)). However, "*Cunningham* effectively overruled . . . Ninth Circuit decisions allowing immediate appeal by attorneys from orders imposing sanctions." *Stanley v. Woodford*, 449 F.3d 1060, 1063 (9th Cir. 2006).

An order imposing sanctions against a nonparty attorney is not immediately appealable where there is sufficient congruence between the interests of the attorney and his or her client in the ongoing litigation that in effect the order is jointly against a party and nonparty. *See* *Washington v. Standard Oil Co. of California (In re Coordinated Pretrial Proceedings in Petroleum Prods. Litig.)*, 747 F.2d 1303, 1305-06 (9th Cir. 1984) (order of contempt imposing sanctions against state attorney general representing state in ongoing proceedings not immediately appealable by attorney general because state ultimately responsible for paying sanctions at issue and attorney general is not merely state's attorney, but also the official responsible for initiating and directing course of litigation).

An order imposing sanctions on an attorney for her discovery abuses, not on a contempt theory, but solely pursuant of the Federal Rules of Civil Procedure, was not a "final decision" from which an appeal would lie, even though the attorney no longer represented any party in the case and might well have a personal interest in pursuing an immediate appeal. *Cunningham*, 527 U.S. at 210; *see also* *American Ironworks & Erectors, Inc. v. North American Constr. Corp.*, 248 F.3d 892, 897 (9th Cir. 2001) (holding that "an interlocutory order granting attorney's fees as a condition of substituting counsel is not immediately appealable" like an interlocutory order imposing Rule 37(a) sanctions); *see also* *Stanley v. Woodford*, 449 F.3d 1060, 1063 (9th Cir. 2006) (district court's order affirming sanctions ordered by magistrate judge was not a final decision).

A district court order, stating that an Assistant United States Attorney had made an improper ex parte contact with a represented party in violation of the California Rules of Professional Conduct, constitutes a sanction and is appealable. *United States v. Talao*, 222 F.3d 1133, 1137 (9th Cir. 2000).

An order imposing sanctions against a party's attorney for failing to obey a scheduling or pretrial order is appealable only after a final judgment has been entered in the underlying action. *Cato v. City of Fresno*, 220 F.3d 1073, 1074 (9th Cir. 2000) (per curiam).

> *Cross-reference*: II.C.10.a.iii (regarding a contempt or sanctions order issued against an attorney and client jointly, rather than solely against the attorney).

(d) Contempt or Sanctions Order against Nonparty Journalist

An order of contempt issued against a nonparty journalist for refusing to comply with a discovery order directing him to produce certain materials in an ongoing defamation suit was a final appealable order. *See Shoen v. Shoen*, 48 F.3d 412, 413 (9th Cir. 1995) (journalist ordered incarcerated until he complied or litigation terminated).

iii. Contempt or Sanctions Order against Party and Nonparty Jointly

Generally, an order awarding sanctions jointly and severally against a party and nonparty is not an appealable collateral order. *See Kordich v. Marine Clerks Assoc.*, 715 F.2d 1392, 1393 (9th Cir. 1983) (per curiam) (order imposing sanctions against attorney and client for filing frivolous motion). Because of the congruence of interest between an attorney and client, it is questionable whether the attorney should be considered a nonparty for purposes of determining appealability. *See id.* ("We see no reason to permit indirectly through the attorney's appeal what the client could not achieve directly on its own: immediate review of interlocutory orders imposing liability for fees and costs.")

> *Cross-reference*: II.C.10.a.ii (regarding the appealability of an order entered against the attorney only rather than the attorney and client jointly).

An order imposing sanctions on an attorney for her discovery abuses is not immediately appealable, even where the attorney no longer represents the party in

the case. *See* *Cunningham v. Hamilton County*, 527 U.S. 198 (1999); *see also* *Kordich*, 715 F.2d at 1393 n.1 ("That appellant withdrew from representation of plaintiffs after the sanctions were imposed is of no moment.").

An order awarding sanctions jointly and severally against a party and nonparty also may be appealed as a collateral order where the sanctions are to be paid before final judgment and the financial instability of the recipient of the award renders the award effectively unreviewable upon final judgment. *See* *Riverhead Sav. Bank v. National Mortgage Equity Corp.*, 893 F.2d 1109, 1113 (9th Cir. 1990). Where the award is payable immediately, but the recipient of the award is not financially unstable, however, appellate review must await final judgment. *See* *Hill v. MacMillan/McGraw-Hill Sch. Co.*, 102 F.3d 422, 424 (9th Cir. 1996) (noting that pivotal fact in *Riverhead* was insolvency of recipient not immediacy of payment).

iv. Denial of Motion for Contempt or Sanctions

A pre-trial order denying a party's motion to hold opposing party in contempt is not immediately appealable. *See* *Sims v. Falk*, 877 F.2d 31, 31 (9th Cir. 1989) (order). *But see* *Diamontiney v. Borg*, 918 F.2d 793, 796 (9th Cir. 1990) (reviewing denial of motion to hold party in contempt in conjunction with an appeal from a preliminary injunction under 28 U.S.C. § 1292(a)(1)).

> *Cross-reference*: V.A.2.c (regarding orders reviewed on appeal from an interlocutory injunctive order).

An order denying a motion for sanctions brought by a party to ongoing litigation is not immediately appealable. *See* *McCright v. Santoki*, 976 F.2d 568, 569-70 (9th Cir. 1992) (per curiam) (order denying plaintiff's motion for Rule 11 sanctions against opposing counsel can be effectively reviewed on appeal from final judgment in underlying action).

b. Appealability of Contempt or Sanctions Order Issued After Final Judgment in an Underlying District Court Proceeding

i. Post-Judgment Contempt or Sanctions Order Generally

A post-judgment contempt order imposing sanctions against a party is a final appealable order. *See* *Hilao v. Estate of Marcos*, 103 F.3d 762, 764 (9th Cir. 1996); *see also* *United States v. Ray*, 375 F.3d 980, 987 (9th Cir. 2004). However, such an order is not appealable until sanctions are imposed. *See* *Blalock Eddy Ranch v. MCI Telecomms. Corp.*, 982 F.2d 371, 374 (9th Cir. 1992) (contempt citation for violating injunction issued in prior action not appealable where sanctions not yet imposed); *see also* *SEC v. Hickey*, 322 F.3d 1123, 1127-28 (9th Cir. 2003) (concluding no jurisdiction to review contempt order where district court never imposed sanctions and Hickey appealed before period of time to purge contempt had expired); *Donovan v. Mazzola*, 761 F.2d 1411, 1416-17 (9th Cir. 1985) (post-judgment civil contempt order for failure to post bond not appealable until after a specified date on which sanctions begin accruing).

ii. Post-Judgment Continuing Contempt Order

"[N]either the undetermined total amount of sanctions, nor the fact that the sanctions are conditional, defeats finality of a post-judgment [continuing] contempt order." *Gates v. Shinn*, 98 F.3d 463, 467 (9th Cir. 1996); *see also* *Stone v. San Francisco*, 968 F.2d 850, 855 (9th Cir. 1992) (contempt order imposing sanctions for every day order is violated appealable even though amount of sanctions undetermined and ongoing). The appealability of a continuing contempt order for violation of a consent decree depends on a "pragmatic balancing" of the policy against piecemeal review and the risk of denying justice by delay. *See* *Gates*, 98 F.3d at 467; *Stone*, 968 F.2d at 855.

Moreover, a contempt order imposing sanctions is appealable even though sanctions have not begun to accrue due to a temporary stay pending appeal. *See* *Stone*, 968 F.2d at 854 n.4 (noting that defendant was not in compliance with consent decree and therefore would be required to pay fines if stay not in effect);

see also *Gates*, 98 F.3d at 467 (staying monetary sanctions so long as there was compliance).

iii. Order Denying Motion to Vacate Contempt Order

"[A] district court's order refusing to vacate an underlying contempt order is nonappealable when the ground on which vacatur is sought existed at the time the contempt order was entered and the contemnor failed to appeal timely from that order." *United States v. Wheeler*, 952 F.2d 326, 327 (9th Cir. 1991) (per curiam) (otherwise contemnor could indefinitely extend time period for appealing issue of ability to comply, thereby undermining time limits of Fed. R. App. P. 4(a)).

c. Appealability of Contempt or Sanctions Order Issued As Final Judgment in Enforcement or Contempt Proceeding

Where a contempt order disposes of the only matter before the district court, the contempt order is appealable as a final judgment.

i. Contempt Order as Final Judgment in Enforcement

In a judicial proceeding brought by the IRS to enforce an administrative summons, an order of contempt for failure to comply with the summons is a final, appealable order. *See* *Reisman v. Caplin*, 375 U.S. 440, 445-49 (1964).

In a judicial proceeding to enforce a grand jury subpoena, an order of contempt for failure to comply with the subpoena is a final, appealable order. *See* *Garcia-Rosel v. United States (In re Grand Jury Proceedings)*, 889 F.2d 220, 221 (9th Cir. 1989) (per curiam) (failure to testify before grand jury after grant of immunity); *United States v. Horn (In re Grand Jury Subpoena Issued to Horn)*, 976 F.2d 1314, 1316 (9th Cir. 1992) (refusal by attorney to produce privileged documents potentially incriminating to client).

ii. Contempt Order as Final Judgment in Contempt Proceeding

A contempt order imposing sanctions for violation of a prior final judgment is itself a final judgment when it is issued in a contempt proceeding limited to that issue. *See* *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1145 (9th Cir. 1983) ("Even though the size of the sanction . . . depends upon the duration of contumacious behavior occurring after entry of the contempt order, the order is nevertheless final for purposes of § 1291.").

11. Default

a. Motion for Default Judgment Granted

A default judgment is a final appealable order under 28 U.S.C. § 1291. *See* *Trajano v. Marcos (In re Ferdinand E. Marcos Human Rights Litig.)*, 978 F.2d 493, 495 (9th Cir. 1992); *see also* *DIRECTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 852 (9th Cir. 2007). However, an order granting default is not final and appealable until judgment is entered. *See* *Baker v. Limber*, 647 F.2d 912, 916 (9th Cir. 1981) (finding appeal premature where damages determination still pending).

b. Motion for Default Judgment Denied

An order denying a motion for default judgment is not a final appealable order. *See* *Bird v. Reese*, 875 F.2d 256, 256 (9th Cir. 1989) (order).

c. Motion to Set Aside Default Judgment Granted

An order granting a motion to set aside a default judgment is not a final appealable order where the set-aside permits a trial on the merits. *See* *Joseph v. Office of the Consulate Gen. of Nigeria*, 830 F.2d 1018, 1028 (9th Cir. 1987) (holding that court of appeals' decision to hear interlocutory appeal regarding district court's jurisdiction over defendants does not extend to grant of motion to set aside).

d. Motion to Set Aside Default Judgment Denied

An order denying a motion to set aside a default judgment is a final appealable order. *See* *Straub v. AP Green, Inc.*, 38 F.3d 448, 450 (9th Cir. 1994).

12. Discovery Orders and Subpoenas

Cross-reference: II.C.12.a (regarding an appeal by a person who is a party to an underlying district court proceeding); II.C.12.b (regarding an appeal by a person not a party to an underlying district court proceeding); II.C.12.c (regarding an appeal by a person who is a party to a proceeding limited to enforcement or discovery).

a. Appeal by a Person Who is a Party to an Underlying District Court Proceeding

A party to an underlying district court proceeding can appeal an adverse discovery ruling before entry of final judgment only where: (1) the party defies the order and is cited for criminal contempt, *see* II.C.12.a.i, or (2) an order protecting a nonparty from discovery is issued by a court outside the circuit in which the district court proceedings are ongoing, *see* II.C.12.a.ii.

Regarding the appealability of a discovery order entered following final judgment in the underlying action, *see* II.C.12.a.iv.

i. Order Compelling Discovery

(a) Discovery Order Issued against Party

An order compelling discovery issued against a party to a district court proceeding is generally not appealable by that party until after final judgment. *See* *Medhekar v. United States Dist. Court*, 99 F.3d 325, 326 (9th Cir. 1996) (per curiam) (granting mandamus relief).

If the party complies with the discovery order, he or she may challenge "any unfair use of the information or documents produced" on appeal from final

judgment, *see* *Bank of Am. v. National Mortgage Equity Corp. (In re National Mortgage Equity Corp. Mortgage Pool Certificates Litig.)*, 857 F.2d 1238, 1240 (9th Cir. 1988) (per curiam), and if the party defies the discovery order, he or she may challenge any ensuing civil contempt citation on appeal from final judgment, *see* *Bingham v. Ward*, 100 F.3d 653, 655 (9th Cir. 1996) (contrasting criminal contempt citation, which is immediately appealable).

> *Cross-reference*: II.C.10.a.i (regarding the appealability of civil v. criminal contempt orders).

(b) Discovery Order Issued against Nonparty

Similarly, an order compelling discovery issued against a nonparty is not immediately appealable by a party who is asserting a privilege regarding the sought-after information until after final judgment. *See* *Bank of Am. v. National Mortgage Equity Corp. (In re National Mortgage Equity Corp. Mortgage Pool Certifications Litig.)*, 857 F.2d 1238, 1240 (9th Cir. 1988) (per curiam).

If the nonparty complies with the discovery order, the party may challenge "any unfair use of information or documents produced" on appeal from final judgment. *See* *id.*

ii. Protective Order

(a) Order Protecting Party from Discovery

Generally, a protective order issued in favor of a party to an ongoing proceeding is not appealable by the opposing party until after entry of final judgment. *See* *KL Group v. Case, Kay & Lynch*, 829 F.2d 909, 918 n.5 (9th Cir. 1987).

(b) Order Protecting Nonparty from Discovery

Generally, an order granting a nonparty's motion to quash a discovery subpoena is not appealable by a party until after the entry of final judgment. *See*

Premium Serv. Corp. v. Sperry Hutchinson Co., 511 F.2d 225, 228-29 (9th Cir. 1975).

However, where the protective order is issued by a district court in a circuit other than the one where proceedings are ongoing, a party may immediately appeal the order because the court of appeals with jurisdiction over the final judgment will not have jurisdiction over the discovery order. *See id.* Note that a protective order issued by a different district court in the same circuit is not immediately appealable because the court of appeals with the jurisdiction over the final judgment in the underlying action will also have jurisdiction over the discovery order. *See Southern California Edison Co. v. Westinghouse Elec. Corp. (In re Subpoena Served on the California Pub. Util. Comm'n)*, 813 F.2d 1473, 1476-77 (9th Cir. 1987).

iii. Pretrial Order to Contribute to Discovery Fund

A pretrial order requiring parties to deposit money into a fund to share costs of discovery is not an appealable collateral order. *See Lopez v. Baxter Healthcare Corp. (In re Baxter Healthcare Corp.)*, 151 F.3d 1148 (9th Cir. 1998) (order) (observing that order was subject to ongoing modification by district court and even contained a refund provision).

iv. Post-Judgment Discovery Orders

An order granting a post-judgment motion to compel production of documents is not appealable until a contempt citation issues. *See Wilkinson v. Federal Bureau of Investigation*, 922 F.2d 555, 558 (9th Cir. 1991) (treating motion to enforce settlement agreement as analogous to traditional discovery motion), *overruled on other grounds by Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994).

However, a post-judgment order denying a motion to compel may be immediately appealed because the aggrieved party does not have the option of defying the order and appealing from an ensuing contempt citation. *See Hagestad v. Tragresser*, 49 F.3d 1430, 1432 (9th Cir. 1995).

b. Appeal by Person Not a Party to An Underlying District Court Proceeding

A person not a party to an underlying district court proceeding generally cannot appeal a discovery order or subpoena without first defying the order and being cited for contempt. *See* II.C.12.b.i. However, a nonparty can appeal without a contempt citation where: (1) the order or subpoena in question directs a third party to produce material in which the person appealing claims an interest, and (2) the third party cannot be expected to risk contempt on the appealing person's behalf, *see* II.C.12.b.ii.

Regarding the appealability of an order denying a motion to compel, *see* II.C.12.b.iii.

i. General Rule: Target of Order Compelling Discovery Cannot Appeal Until Contempt Citation Issues

An order compelling production of documents or testimony issued against a nonparty is generally not appealable by the nonparty. *See* *United States v. Ryan*, 402 U.S. 530, 532-33 (1971); *David v. Hooker, Ltd.*, 560 F.2d 412, 415-16 (9th Cir. 1977). Rather, the nonparty must choose either to comply with the order to produce or defy the order to produce and face a possible contempt citation. *See* *Ryan*, 402 U.S. at 532-33; *David*, 560 F.2d at 415-16 (observing that aggrieved person does not have option of challenging discovery order on appeal from a final judgment because he or she is not a party to any ongoing litigation).

If a nonparty chooses to comply with a discovery order or subpoena, he or she may appeal from an order denying post-production reimbursement of costs under the collateral order doctrine. *See* *United States v. CBS, Inc.*, 666 F.2d 364, 369-70 (9th Cir. 1982). The nonparty may also object to the introduction of the materials he or she produced, or the fruits thereof, at any subsequent criminal trial. *See* *Ryan*, 402 U.S. at 532 n.3.

If a nonparty chooses to resist, he or she may appeal a subsequent adjudication of contempt. *See* *Ryan*, 402 U.S. at 532-33; *David*, 560 F.2d at 415-16. A contempt order against a nonparty is considered final with regard to the

nonparty. *See* *David*, 560 F.2d at 416-17 (order equivalent to contempt citation, i.e. order awarding sanctions under Fed. R. Civ. P. 37(b)(2), issued against nonparty for failure to comply with court order compelling production of documents in ongoing litigation, appealable by nonparty).

Cross-reference: II.C.10 (regarding the appealability of contempt orders).

ii. Exceptions Permitting Appeal Absent Contempt Citation

Under certain circumstances, a nonparty may appeal a discovery-related order in the absence of a contempt citation. *See* *Unites States v. Ryan*, 402 U.S. 530, 533 (1971) (stating that the exception to the rule of nonappealability is recognized "[o]nly in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims").

(a) Discovery Order or Subpoena Directed against Third Party (*Perlman* Exception)

Generally, an order denying a motion to quash a grand jury subpoena directing a third party to produce documents is appealable by the person asserting a privilege as to those documents because the third party "normally will not be expected to risk a contempt citation but will instead surrender the sought-after information, thereby precluding effective appellate review at a later stage." *Alexiou v. United States (In re Subpoena to Testify Before the Grand Jury)*, 39 F.3d 973, 975 (9th Cir. 1994) (citing *Perlman v. United States*, 247 U.S. 7 (1918)). *See also* *United States v. Griffin*, 440 F.3d 1138, 1143 (9th Cir. 2006) (concluding *Perlman* exception applied where district court order was directed at the special master, a disinterested third-party custodian of allegedly privileged documents).

However, once a third party discloses the sought-after information, the *Perlman* exception is no longer applicable. *See* *Bank of Am. v. Feldman (In re National Mortgage Equity Corp. Mortgage Pool Certificates Litig.)*, 821 F.2d 1422, 1424 (9th Cir. 1987) (observing that the *Perlman* exception is intended to prevent disclosure of privileged information, not to facilitate a determination of

whether previously-disclosed information is subject to a protective order or admissible at trial).

(1) Examples of Orders Denying Motions Quash Subpoenas That Are Appealable

The following orders denying motions to quash subpoenas directing third parties (such as attorneys) to reveal information were appealable under the *Perlman* exception because the third parties could not be expected to risk a contempt citation:

- Order denying attorney's motion to quash subpoena directing him to reveal information about a client under investigation. *See* *Alexiou v. United States (In re Subpoena to Testify Before the Grand Jury)*, 39 F.3d 973, 975 (9th Cir. 1994) (concluding that attorney "cannot be expected to accept a contempt citation and go to jail in order to protect the identity of a client who paid his fee with counterfeit money").

- Order denying attorney's motion to quash a subpoena directing him to reveal information about a former client under investigation. *See* *Schofield v. United States (In re Grand Jury Proceeding)*, 721 F.2d 1221, 1221-22 (9th Cir. 1983) (attorney-client relationship was ongoing during time period specified in subpoena, but had ceased by the time the subpoena was issued). *Cf.* *Doe v. United States (In re Grand Jury Subpoena Dated June 5, 1985)*, 825 F.2d 231, 237 (9th Cir. 1987) (distinguishing between present and former clients in concluding order not appealable).

  Cross-reference: II.C.12.b.ii (examples of orders denying motions to quash subpoenas that are not appealable).

- Order denying client's motion to quash subpoena directing law firm to produce client's documents immediately appealable by client where law firm complied with subpoena by surrendering documents to court. *See* *Does I-IV v. United States (In re Grand Jury Subpoena Dated December 10, 1987)*, 926 F.2d 847, 853 (9th Cir. 1991) (noting that

denial of law firm's motion to quash was an unappealable interlocutory order as to the firm because it had complied with the subpoena).

- Order denying motion to quash subpoena directing third-party psychiatrist to produce movant's psychiatric record. *See* *In re Grand Jury Proceedings*, 867 F.2d 562, 564 (9th Cir. 1989) (per curiam) (noting that Ninth Circuit had not recognized a psychotherapist-patient privilege in the criminal context), *abrogated on other grounds by* *Jaffee v. Redmond*, 518 U.S. 1 (1996).

- Order denying police officer's motion to quash grand jury subpoena directing his supervisor to produce an internal affairs report relating to officer. *See* *Kinamon v. United States (In re Grand Jury Proceedings)*, 45 F.3d 343, 346 (9th Cir. 1995).

(2) Examples of Orders Denying Motions to Quash Subpoenas That Are Not Appealable

The following orders denying motions to quash subpoenas directing third parties to reveal privileged information were not appealable under the *Perlman* exception because the third party could be expected to risk a contempt citation to protect the information:

An order denying a client's motion to quash an order directing his or her attorney to reveal information purportedly covered by the attorney-client privilege is not appealable by the client because "the attorney is an active participant in the litigation, appealing from the district court's denial of his motion to quash on his own behalf." *Doe v. United States (In re Grand Jury Subpoena dated June 5, 1985)*, 825 F.2d 231, 237 (9th Cir. 1987) (attorney was required to act in best interests of client and to assert any applicable privileges, which he did). The *Perlman* rationale is less compelling in such a case because the third party attorney "is both subject to the control of the person or entity asserting the privilege and is a participant in the relationship out of which the privilege emerges." *Id.* (recognizing that in certain cases, immediate appeal has been permitted even though the third party attorney was still arguably representing the client).

Similarly, an order denying a motion to quash a subpoena directed at a third-party accountant, who was an agent of the movant and a party to the relationship upon which the claim of privilege is based, is also unappealable under *Perlman*. *See* *Silva v. United States (In re Grand Jury Subpoena Issued to Bailin)*, 51 F.3d 203, 205-06 (9th Cir. 1995) (per curium) (concluding that under these circumstances, third party can be expected to risk contempt citation to protect the privileged relationship).

Instead, the attorney (or accountant) can appeal from a contempt citation following refusal to comply. *See* *Ralls v. United States*, 52 F.3d 223, 225 (9th Cir. 1995); *United States v. Horn (In re Grand Jury Subpoena Issued to Horn)*, 976 F.2d 1314, 1316 (9th Cir. 1992). Moreover, either attorney (or accountant) or client can move to suppress evidence at any subsequent criminal trial. *See* *Doe*, 825 F.2d at 237.

(b) Order Directed against Head of State

An order denying a motion to quash a subpoena directed at the President of the United States is appealable. *See* *United States v. Nixon*, 418 U.S. 683, 690-92 (1974) ("To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government."). *But see* *Estate of Domingo*, 808 F.2d 1349, 1351 (9th Cir. 1987) (holding that order denying motion to terminate deposition by former President of the Philippines was not appealable because he is "hardly comparable to . . . the President of the United States").

The court of appeals has declined to recognize an exception to nonappealability for governmental entities. *See* *Newton v. NBC*, 726 F.2d 591, 593 (9th Cir. 1984) (order compelling nonparty governmental entity to produce documents despite claim of privilege not appealable by government absent a finding of contempt).

iii. Appeal from Order Denying Motion to Compel

An order denying a motion to compel production of documents, or denying a motion for return of seized property may be immediately appealed by a nonparty because he or she does not have the option of defying the order and appealing from an ensuing contempt citation. *See* Hagestad v. Tragresser, 49 F.3d 1430, 1432 (9th Cir. 1995) (citing *Wilkinson v. Federal Bureau of Investigation*, 922 F.2d 555, 558 (9th Cir. 1991)) (order denying an intervenor's post-judgment motion to compel production of documents); *see also* DiBella v. United States, 369 U.S. 121, 131-32 (1962) (order denying motion for return of seized property final and appealable where no criminal prosecution pending against movant).

c. Appeal by Person Who is a Party to a Proceeding Limited to Enforcement or Discovery

i. Discovery Order Issued as Final Judgment in Enforcement Proceeding

A discovery-related order is immediately appealable where it is entered as the final judgment in a proceeding limited to enforcement of an administrative summons or subpoena. *See* United States v. Vallance, 793 F.2d 1003, 1005 (9th Cir. 1986) (order enforcing IRS summons); United States Envtl. Protection Agency v. Alyeska Pipeline Serv. Co., 836 F.2d 443, 445 (9th Cir. 1988) (order enforcing EPA subpoena).

> *Cross-reference*: II.C.10.c.i (regarding the appealability of contempt orders issued as final judgments in enforcement proceedings).

ii. Discovery Order Issued as Final Judgment in Discovery Proceeding

A discovery order is also immediately appealable where it is entered as the final judgment in a proceeding limited to an application for discovery. *See* United States v. CBS, Inc., 666 F.2d 364, 369 n.4 (9th Cir. 1982).

Order compelling production of documents and things is a final appealable order in a proceeding upon a petition to perpetuate certain evidence. *See* *Martin v. Reynolds Metals Corp.*, 297 F.2d 49, 51 (9th Cir. 1961).

Order appointing commissioners to facilitate gathering of evidence is a final appealable order in an action brought pursuant to 28 U.S.C. § 1782 to assist foreign and international tribunals and litigants before such tribunals. *See* *Okubo v. Reynolds (In re Letters Rogatory from the Tokyo Dist. Prosecutor's Office)*, 16 F.3d 1016, 1018 n.1 (9th Cir. 1994); *see also United States v. Sealed 1, Letter of Request for Legal Assistance from the* *Deputy Prosecutor General of the Russian Federation*, 235 F.3d 1200, 1203 (9th Cir. 2000).

Order requesting government to release documents or denying plaintiff access to documents is a final, appealable order in a Freedom of Information Act ("FOIA") action. *See* *United States v. Steele (In re Steele)*, 799 F.2d 461, 464-65 (9th Cir. 1986) (order represents the "full, complete and final relief available" in a FOIA action). *But see* *Church of Scientology Int'l v. IRS*, 995 F.2d 916, 921 (9th Cir. 1993) (order declaring particular document not exempt under attorney-client privilege is not final and appealable if it does not also order government to produce document).

13. DISMISSAL

a. Dismissal Denied

i. Generally

Generally, an order denying a motion to dismiss is not appealable because it does not end the litigation on the merits. *See* *Confederated Salish v. Simonich*, 29 F.3d 1398, 1401-02 (9th Cir. 1994).

For example, orders denying motions to dismiss on the following grounds are not immediately appealable:

- Contractual forum selection clause. *See* *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498 (1989).

- Forum non conveniens. *See* *Van Cauwenberghe v. Biard*, 486 U.S. 517, 526-27 (1988).

- Claim of immunity from service of process after extradition. *See* *Van Cauwenberghe*, 486 U.S. at 523-24 ("specialty doctrine" in federal extradition law).

- Lack of venue. *See* *Phaneuf v. Indonesia*, 106 F.3d 302, 304 (9th Cir. 1997).

- *Younger* abstention doctrine. *See* *Confederated Salish*, 29 F.3d at 1401-02.

ii. Denial of Immunity

An order denying a motion to dismiss on immunity grounds may be appealable as a collateral order. *See* II.C.17 (Immunity); II.A.2 (Collateral Order Doctrine).

b. Dismissal Granted

i. Generally

An order granting dismissal is final and appealable "if it (1) is a full adjudication of the issues, and (2) 'clearly evidences the judge's intention that it be the court's final act in the matter.'" *National Distrib. Agency v. Nationwide Mut. Ins. Co.*, 117 F.3d 432, 433 (9th Cir. 1997) (citation omitted); *see also* *Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 870-72 (9th Cir. 2004). The focus is on the intended effect of the order not the label assigned to it. *See* *Montes v. United States*, 37 F.3d 1347, 1350 (9th Cir. 1994); *see also* *Disabled Rights Action Committee*, 375 F.3d at 870.

ii. Dismissal of Complaint v. Dismissal of Action

As a general rule, an order dismissing the "complaint" rather than the "action" is not a final appealable order. *See* *California v. Harvier*, 700 F.2d 1217, 1218 (9th Cir. 1983). For example, an order dismissing the complaint rather than

the action held to be unappealable where it was unclear whether the district court determined that amendment would be futile, and it appeared from the record that it may not be futile. *See id.* (observing that, although claims against defendants in their representative capacity were dismissed, plaintiff could amend to name defendants in their individual capacities).

However, the district court's apparent intent, not the terminology it uses, is determinative. *See Montes v. United States*, 37 F.3d 1347, 1350 (9th Cir. 1994); *see also Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 870 (9th Cir. 2004). For example, an order dismissing the "action" without prejudice rather than the "complaint" was held to be unappealable where the district court's words and actions indicated an intent to grant leave to amend. *See Montes*, 37 F.3d at 1350*; see also In re Ford Motor Co./Citibank (South Dakota), N.A.*, 264 F.3d 952 (9th Cir. 2001) (reviewing dismissal of "complaint" because it was clear the district court intended to dismiss the action). Conversely, an order dismissing the "complaint" rather than the "action" was held to be appealable where "circumstances ma[d]e it clear that the court concluded that the action could not be saved by any amendment of the complaint." *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1172 n.1 (9th Cir. 1984) (reviewing dismissal on Eleventh Amendment immunity grounds), *overruled on other grounds as recognized by Arakaki v. Lingle*, 477 F.3d 1048, 1062 (9th Cir. 2007).

iii. Leave to Amend Complaint

(a) Leave to Amend Expressly Granted

Where the district court expressly grants leave to amend, the dismissal order is not final and appealable. *See Telluride Mgmt. Solutions v. Telluride Inv. Group*, 55 F.3d 463, 466 (9th Cir. 1995), *overruled on other grounds by Cunningham v. Hamilton County*, 527 U.S. 198 (1999). The order is not appealable even where the court grants leave to amend as to only some of the dismissed claims. *See Indian Oasis-Baboquivari Unified Sch. Dist. v. Kirk*, 109 F.3d 634, 636 (9th Cir. 1997) (en banc).

A plaintiff may not simply appeal a dismissal with leave to amend after the period for amendment has elapsed; the plaintiff must seek a final order if the

district court does not take further action on its own. *See* *WMX Tech., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997).

(b) Leave to Amend Expressly Denied

Where the district court expressly denies leave to amend, the order is final and appealable. *See* *Scott v. Eversole Mortuary*, 522 F.2d 1110, 1112 (9th Cir. 1975).

(c) Leave to Amend Not Expressly Granted or Denied

A district court's failure to expressly grant (or deny) leave to amend supports an inference that the court determined the complaint could not be cured by amendment. *See* *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1172 n.1 (9th Cir. 1984), *overruled on other grounds as recognized by* *Arakaki v. Lingle*, 477 F.3d 1048, 1062 (9th Cir. 2007).

(1) Deficiencies Appear Incurable

An order of dismissal is appealable where it appears from the record that the complaint's deficiencies cannot be cured by amendment. *See* *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1172 n.1 (9th Cir. 1984), *overruled on other grounds as recognized by* *Arakaki v. Lingle*, 477 F.3d 1048, 1062 (9th Cir. 2007); (Eleventh Amendment immunity); *see also* *Butler v. Adams*, 397 F.3d 1181, 1183 (9th Cir. 2005) (failure to exhaust claim); *Martinez v. Gomez*, 137 F.3d 1124, 1126 (9th Cir. 1998) (per curiam) (statute of limitations); *Ramirez v. Fox Television, Inc.*, 998 F.2d 743, 747 (9th Cir. 1993) (failure to exhaust grievance procedures); *Nevada v. Burford*, 918 F.2d 854, 855 (9th Cir. 1990) (lack of standing); *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1514 (9th Cir. 1987) (no state action); *Kilkenny v. Arco Marine Inc.*, 800 F.2d 853, 855-56 (9th Cir. 1986) (proper parties).

(2) Deficiencies Appear Curable

An order of dismissal is not appealable where it is unclear whether the district court determined amendment would be futile, and it appears from the record that it may not be futile. *See* *California v. Harvier*, 700 F.2d 1217, 1218

(9th Cir. 1983) (claims against defendants in their representative capacity dismissed but plaintiff could amend to name defendants in their individual capacities).

iv. Involuntary Dismissal

(a) Dismissal with Prejudice

A dismissal with prejudice is a final appealable order. *See Al-Torki v. Kaempen*, 78 F.3d 1381, 1384-85 (9th Cir. 1996).

(b) Dismissal without Prejudice

Whether a dismissal "without prejudice" is final depends on whether the district court intended to dismiss the complaint without prejudice to filing an amended complaint, or to dismiss the action without prejudice to filing a new action. *See Montes v. United States*, 37 F.3d 1347, 1350 (9th Cir. 1994); *see also Lopez v. Needles*, 95 F.3d 20, 22 (9th Cir. 1996) (holding that where record indicates district court anticipated amendment, order is not final and appealable).

A dismissal without prejudice is appealable where leave to amend is not specifically granted and amendment could not cure the defect. *See Martinez v. Gomez*, 137 F.3d 1124, 1126 (9th Cir. 1998) (per curiam) (treating dismissal without prejudice as final order where statute of limitations bar could not be cured by amendment). A dismissal without prejudice is also appealable where it "effectively sends the party out of [federal] court." *See Ramirez v. Fox Television, Inc.*, 998 F.2d 743, 747 (9th Cir. 1993) (involving dismissal for failure to exhaust grievance procedures following finding of preemption); *United States v. Henri*, 828 F.2d 526, 528 (9th Cir. 1987) (per curiam) (involving dismissal under primary jurisdiction doctrine).

(c) Dismissal for Failure to Prosecute

A dismissal for failure to prosecute is a final appealable order. *See Al-Torki v. Kaempen*, 78 F.3d 1381, 1386 (9th Cir. 1996) (dismissal with prejudice); *Ash v. Cvetkov*, 739 F.2d 493, 497-98 (9th Cir. 1984) (dismissal without prejudice).

However, prior interlocutory rulings are not subject to review by the court of appeals, whether the failure to prosecute was deliberate or due to negligence or mistake. *See Al-Torki*, 78 F.3d at 1386; *Ash*, 739 F.2d at 497-98.

> *Cross-reference*: V.A.1.b (regarding rulings that do not merge into a final judgment).

v. Voluntary Dismissal without Prejudice

(a) Appealability of Voluntary Dismissal Order

A voluntary dismissal under Fed. R. Civ. P. 41 is presumed to be without prejudice unless under otherwise stated. *See Concha v. London*, 62 F.3d 1493, 1506 (9th Cir. 1995) (holding a Fed. R. Civ. P. 41 dismissal to be with prejudice).

Generally, a voluntary dismissal without prejudice is not appealable by the plaintiff (the dismissing party) because it is not adverse to the plaintiff's interests. *See Concha*, 62 F.3d at 1507 (observing that plaintiff is free to "seek an adjudication of the same issue at another time in the same or another forum"); *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 556 (9th Cir. 1987) (holding that order of voluntary dismissal without prejudice may be appealable by the defendant to the extent the district court denied defendant's request for fees and costs as a condition of dismissal). *See also Stevedoring Serv. of Am. v. Armilla Int'l B.V.*, 889 F.2d 919, 920-21 (9th Cir. 1989) (reaching the merits).

> *Cross-reference*: IX.A (regarding requirements for standing to appeal).

(b) Impact of Voluntary Dismissal of Unresolved Claims on Appealability of Order Adjudicating Certain Claims

Whether an order adjudicating certain claims is appealable after remaining claims are voluntarily dismissed without prejudice depends on which party voluntarily dismissed the remaining claims.

(1) Voluntary Dismissal by Losing Party

As a general rule, a losing party may not create appellate jurisdiction over an order adjudicating fewer than all claims by voluntarily dismissing without prejudice any unresolved claims. *See* *Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073, 1076-77 (9th Cir. 1994) (concluding there was no jurisdiction where remaining claims dismissed without prejudice pursuant to stipulation); *Fletcher v. Gagosian*, 604 F.2d 637, 638-39 (9th Cir. 1979) (stating that policy against piecemeal appeals cannot be avoided at "the whim of the plaintiff"). The dismissal of certain claims without prejudice to revival in the event of reversal and remand is not a final order. *See* *Dannenberg*, 16 F.3d at 1076-77.

However, an order dismissing without prejudice claims against unserved defendants does not affect the finality of an order dismissing with prejudice claims against all served defendants. *See* *Cooper v. Pickett*, 137 F.3d 616, 621-22 (9th Cir. 1998) (noting that dismissal was pursuant to stipulation of the parties).

> *Cross-reference*: II.C.13.b.viii (regarding dismissal of fewer than all claims).

Moreover, an order dismissing without prejudice a claim for indemnification was held not to affect the finality of a partial summary judgment because the indemnity claim was entirely dependent upon plaintiff's success on the underlying claim. *See* *Horn v. Berdon, Inc. Defined Benefit Pension Plan*, 938 F.2d 125, 126-27 (9th Cir. 1991) (per curiam) (noting that dismissal was pursuant to stipulation of parties).

"When a party that has suffered an adverse partial judgment subsequently dismisses remaining claims without prejudice with the approval of the district court, and the record reveals no evidence of intent to manipulate [] appellate jurisdiction, the judgment entered after the district court grants the motion to dismiss is final and appealable" as a final decision of the district court. *James v. Price Stern Sloan*, 283 F.3d 1064, 1070 (9th Cir. 2002); *see also* *American States Ins. Co. v. Dastar Corp.*, 318 F.3d 881, 885 (9th Cir. 2003); *Amadeo v. Principle Mut. Life Ins. Co.*, 290 F.3d 1152, 1158 n.1 (9th Cir. 2002).

(2) Voluntary Dismissal by Prevailing Party

If after adjudication of fewer than all claims, a prevailing party voluntarily dismisses remaining claims without prejudice, the order adjudicating certain claims is final and appealable. *See* *Local Motion, Inc. v. Niescher*, 105 F.3d 1278, 1279, 1281 (9th Cir. 1997) (per curiam) (prevailing party failed in its attempt to prevent opposing party from appealing grant of summary judgment by dismissing remaining claims without prejudice); *cf.* *United Nat'l Ins. Co. v. R & D Latex Corp.*, 141 F.3d 916, 918 n.1 (9th Cir. 1998) (prevailing party succeeded in its attempt to facilitate opposing party's appeal from grant of summary judgment by dismissing remaining claims without prejudice).

vi. Voluntary Dismissal with Prejudice

A voluntary dismissal with prejudice is generally not appealable where it is entered unconditionally pursuant to a settlement agreement. *See* *Seidman v. City of Beverly Hills*, 785 F.2d 1447, 1448 (9th Cir. 1986) (no jurisdiction over order dismissing entire action with prejudice pursuant to stipulation because order not adverse to appellant).

However, following adjudication of fewer than all claims, a plaintiff may dismiss with prejudice any unresolved claims in order to obtain review of the prior rulings. *See* *Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073, 1078 (9th Cir. 1994) (observing that a voluntary dismissal with prejudice precludes possibility of later pursuing the dismissed claims); *Coursen v. A.H. Robins Co.*, 764 F.2d 1329, 1342, *corrected by* 773 F.2d 1049 (9th Cir. 1985).

> *Cross-reference*: IX.A (regarding the requirements for standing to appeal).

vii. Dismissal Subject to Condition or Modification

If a district court judgment is conditional or modifiable, the requisite intent to issue a final order is lacking. *See* *Zucker v. Maxicare Health Plans Inc.*, 14 F.3d 477, 483 (9th Cir. 1994) (concluding order was not final where it stated it would become final only after parties filed a joint notice of state court decision); *see also*

Disabled Rights Action Comm. v. Las Vegas Events, Inc., 375 F.3d 861, 871 (9th Cir. 2004) (concluding order not final where district court granted motion to modify previous order, explaining that, had it intended the order to be final, it would have denied the motion to modify as moot); *Nat'l Distrib. Agency v. Nationwide Mut. Ins. Co.*, 117 F.3d 432, 433-34 (9th Cir. 1997) (concluding order was not final where it stated "the court may amend or amplify this order with a more specific statement of the grounds for its decision").

viii. Dismissal of Fewer Than All Claims

As a general rule, an order dismissing fewer than all claims is not final and appealable unless it is certified under Fed. R. Civ. P. 54(b). *See Chacon v. Babcock*, 640 F.2d 221, 222 (9th Cir. 1981). *See* II.A.1.b.ii (regarding what constitutes dismissal of all claims).

However, an order dismissing an action as to all served defendants, so that only unserved defendants remain, may be final and appealable if the validity of attempted service is not still at issue. *See Patchick v. Kensington Publ'g Corp.*, 743 F.2d 675, 677 (9th Cir. 1984) (per curiam) (holding order not appealable because service issue not resolved).

Moreover, an order dismissing fewer than all claims may be treated as a final order where the remaining claims are subsequently finalized. *See Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 680-81 (9th Cir. 1980) (federal claim dismissed as to remaining defendants and state claim remanded to state court); *see also Gallea v. United States*, 779 F.2d 1403, 1404 (9th Cir. 1986) (action remanded to state court following dismissal of federal claim).

14. DISQUALIFICATION

Disqualification orders are not immediately appealable, but certain disqualification orders may be reviewed on petition for writ of mandamus. *See Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1343-44 (9th Cir. 1981). *See* II.D.4.d (regarding the availability of mandamus relief from disqualification orders).

a. Disqualification of Counsel

Orders disqualifying counsel are not immediately appealable collateral orders. *See* *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 440-41 (1985).

Orders denying disqualification of counsel are also unappealable. *See* *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 369-70 (1981); *see also* *Aguon-Schulte v. Guam Election Com'n*, 469 F.3d 1236, 1239 (9th Cir. 2006) (motion to strike appearances by outside counsel).

b. Disqualification of District Judge

An order granting recusal of a district court judge is not an appealable collateral order. *See* *Arizona v. Ideal Basic Indus. (In re Cement Antitrust Litig.)*, 673 F.2d 1020, 1023-25 (9th Cir. 1982) (plaintiffs have no protectable interests in particular judge continuing to preside over action).

An order denying disqualification of district judge is also unappealable. *See* *United States v. Washington*, 573 F.2d 1121, 1122 (9th Cir. 1978).

15. IN FORMA PAUPERIS STATUS

As a general rule, an order denying a motion to proceed in forma pauperis is an appealable final order. *See* *Roberts v. United States Dist. Court*, 339 U.S. 844, 845 (1950) (per curiam) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)); *see also* *Andrews v. King*, 398 F.3d 1113, 1118 (9th Cir. 2005).

However, a magistrate judge has no authority to enter a final order denying in forma pauperis status absent reference by district court and consent of litigants in compliance with 28 U.S.C. § 636(c). *See* *Tripati v. Rison*, 847 F.2d 548, 548-49 (9th Cir. 1988). Thus, an appeal from such an order must be dismissed and the action remanded to the district judge. *See* *id.*

Moreover, where a magistrate judge recommends that the district court deny a motion to proceed in forma pauperis, the movant does not have ten days to file written objections. *See* *Minetti v. Port of Seattle*, 152 F.3d 1113, 1114 & n.1 (9th Cir. 1998) (per curiam) (holding that objection procedure under 28 U.S.C.

§ 636(b)(1)(C) did not apply to motion to proceed in forma pauperis, and affirming district court judgment denying forma pauperis status).

Cross-reference: II.C.3 (regarding appointment of counsel); II.C.22 (regarding pre-filing review orders); IV.B.2 (regarding construing a motion to proceed in forma pauperis as a notice of appeal).

16. IMMIGRATION

See Office of Staff Attorneys' Immigration Outline.

17. IMMUNITY

a. Generally

An order denying immunity, whether an order of dismissal or of summary judgment, may be immediately appealed under the collateral order doctrine if the asserted immunity is "an immunity from suit rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *see also Will v. Hallock*, 546 U.S. 345, 350 (2006) (orders rejecting absolute immunity and qualified immunity are immediately appealable); *KRL v. Estate of Moore*, 512 F.3d 1184, 1188 (9th Cir. 2008) (order denying motion for summary judgment was appealable because the motion was based on qualified immunity); *Rodis v. City & County of San Francisco*, 499 F.3d 1094, 1097 (9th Cir. 2007) (same); *Kohlrautz v. Oilmen Participation Corp.*, 441 F.3d 827, 830 (9th Cir. 2006) (jurisdiction where claim of official immunity was asserted as a defense to state-law cause of action); *Lee v. Gregory*, 363 F.3d 931, 932 (9th Cir. 2004) (order denying motion for summary judgment was appealable because the motion was based on qualified immunity). Such an order is reviewable to the extent it raises an issue of law. *See Mitchell*, 472 U.S. at 528; *see also Kohlrautz*, 441 F.3d at 830; *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003), *reh'g & reh'g en banc denied by* 351 F.3d 904 (9th Cir. 2003), *cert. denied by* 541 U.S. 1085 (2004). A district court order that defers a ruling on immunity for a limited time to determine what relevant functions were performed is generally not appealable. *See Miller v. Gammie*, 335 F.3d 889, 894-95 (9th Cir. 2003). Additionally, the court of appeals will not have jurisdiction to review the denial of a motion for summary judgment based on qualified immunity

where the district court fails to make a complete, final ruling on the issue. *See* *Way v. County of Ventura*, 348 F.3d 808, 810 (9th Cir. 2003).

> *Cross-reference*: II.C.17.g.ii (regarding whether a determination in a qualified immunity case is legal or factual); II.A.2 (regarding the requirements of the collateral order doctrine, generally).

b. Absolute Presidential or Legislative Immunity

An order denying summary judgment based on assertion of absolute presidential immunity is an appealable collateral order. *See* *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982).

Similarly, an order denying a motion to dismiss on absolute legislative immunity grounds is appealable as a collateral order. *See* *Trevino v. Gates*, 23 F.3d 1480, 1481 (9th Cir. 1994).

c. State Sovereign Immunity

An order denying a motion to dismiss based on state sovereign immunity under the Eleventh Amendment is an appealable collateral order. *See* *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-46 (1993) (observing that Eleventh Amendment confers immunity from suit on states and arms of state); *Clark v. State of Cal.*, 123 F.3d 1267, 1269 (9th Cir. 1997); *see also* *Phiffer v. Columbia River Correctional, Institute*, 384 F.3d 791, 792 (9th Cir. 2004) (per curiam) (explaining that the court has never required a showing of a "serious and unsettled question of law" for an interlocutory appeal of Eleventh Amendment immunity); *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1184 n.1 (9th Cir. 2003); *Thomas v. Nakatani*, 309 F.3d 1203, 1207-08 (9th Cir. 2002) (explaining that the court of appeals will hear a state's appeal from a decision denying immunity because the "benefit of the immunity is lost or severely eroded once the suit is allowed to proceed past the motion stage of the litigation").

d. Foreign Sovereign Immunity

An order denying a motion to dismiss based on the sovereign immunity of Guam is an appealable collateral order. *See* *Marx v. Guam*, 866 F.2d 294, 296 (9th Cir. 1989).

Similarly, an order denying foreign sovereign immunity under the Foreign Sovereign Immunities Act is appealable as a collateral order. *See* *Gupta v. Thai Airways Int'l, Ltd.*, 487 F.3d 759, 763-64 (9th Cir. 2007); *Blaxland v. Commonwealth Dir. of Pub. Prosecutions*, 323 F.3d 1198, 1203 (9th Cir. 2003) (Australia); *In re Republic of Philippines*, 309 F.3d 1143, 1148-49 (9th Cir. 2002) (Philippines); *Holden v. Canadian Consulate*, 92 F.3d 918, 919 (9th Cir. 1996) (Canada); *Schoenberg v. Exportadora de Sal, S.A.*, 930 F.2d 777, 779 (9th Cir. 1991) (Mexico); *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court*, 859 F.2d 1354, 1358 (9th Cir. 1988) (per curiam) (Mexico).

e. Federal Sovereign Immunity

An order denying a motion to dismiss based on federal sovereign immunity is not an appealable collateral order. *See* *Alaska v. United States*, 64 F.3d 1352, 1355 (9th Cir. 1995) (citations omitted) (observing that denial can be effectively vindicated following final judgment because federal sovereign immunity is "a right not to be subject to a binding judgment" rather than "a right not to stand trial altogether").

f. Military Service Immunity (*Feres* doctrine)

An order denying a motion to dismiss based on an assertion of *Feres* intramilitary immunity is an appealable collateral order. *See* *Lutz v. Secretary of the Air Force*, 944 F.2d 1477, 1480-84 (9th Cir. 1991); *see also* *Jackson v. Brigle*, 17 F.3d 280, 281-82 (9th Cir. 1994).

g. Qualified Immunity of Government Employees

i. Order Denying Dismissal or Summary Judgment

An order denying qualified immunity may be immediately appealable whether the immunity was raised in a motion to dismiss or a motion for summary

judgment. *See* *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *see also* *KRL v. Estate of Moore*, 512 F.3d 1184, 1188 (9th Cir. 2008) (order denying motion for summary judgment was appealable because the motion was based on qualified immunity); *Brittain v. Hansen*, 451 F.3d 982, 987 (9th Cir. 2006). "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell*, 472 U.S. at 526. (citations omitted). "Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." *Id.* (citations omitted).

> *Cross-reference*: II.C.17.g.iii (regarding successive appeals from orders denying immunity).

ii. Only Legal Determinations Subject to Review

A pretrial order denying immunity is reviewable only to the extent it raises an issue of law. *See* *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985); *see also* *Kohlrautz v. Oilmen Participation Corp.*, 441 F.3d 827, 830 (9th Cir. 2006); *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003), *reh'g & reh'g en banc denied by* 351 F.3d 904 (9th Cir. 2003), *cert. denied by* 541 U.S. 1085 (2004). For purposes of resolving a purely legal question, the court may assume disputed facts in the light most favorable to the nonmoving party. *See* *Carnell v. Grimm*, 74 F.3d 977, 979 (9th Cir. 1996); *see also* *Kohlrautz*, 441 F.3d at 830; *Beier v. City of Lewiston*, 354 F.3d 1058, 1063 (9th Cir. 2004).

(a) Legal Determinations Defined

Whether governing law was clearly established is a legal determination. *See* *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985); *Moran v. Washington*, 147 F.3d 839, 843 (9th Cir. 1998); *Carnell v. Grimm*, 74 F.3d 977, 979 (9th Cir. 1996); *V-1 Oil Co. v. Smith*, 114 F.3d 854, 856 (9th Cir. 1997); *Brewster v. Board of Educ. of the Lynwood Unified Sch. Dist.*, 149 F.3d 971, 976-77 (9th Cir. 1998).

Whether specific facts constitute a violation of established law is a legal determination. *See* *Osolinski v. Kane*, 92 F.3d 934, 935-36 (9th Cir. 1996)

(operative facts undisputed); *see also* *V-1 Oil Co.*, 114 F.3d at 856 (assuming facts in light most favorable to nonmoving party). For example, where a summary judgment motion based on qualified immunity is denied, it is a legal determination whether the facts as shown by the nonmoving party demonstrate that the official acted reasonably. *See* *Gausvik v. Perez*, 345 F.3d 813, 816 (9th Cir. 2003).

Whether a dispute of fact is material is a legal determination. *See* *Collins v. Jordan*, 110 F.3d 1363, 1370 (9th Cir. 1996) ("[A] denial of summary judgment on qualified immunity grounds is not always unappealable simply because a district judge has stated that there are material issues of fact in dispute."); *see also* *Bingue v. Prunchak*, 512 F.3d 1169, 1172 (9th Cir. 2008) (explaining that the court can determine whether the disputed facts simply are not material).

The court of appeals may consider the legal question of whether, taking all facts and inferences therefrom in favor of the plaintiff, the defendant is entitled to qualified immunity as a matter of law. *Jeffers v. Gomez*, 267 F.3d 895, 903-06 (9th Cir. 2001) (per curiam); *see also* *Bingue*, 512 F.3d at 1172; *Wilkins v. City of Oakland*, 350 F.3d 949, 951-952 (9th Cir. 2003).

(b) Factual Determination Defined

Whether the record raises a genuine issue of fact is a factual determination. *See* *Lee v. Gregory*, 363 F.3d 931, 932 (9th Cir. 2004) ("The district court's determination that the parties' evidence presents genuine issues of material fact is not reviewable on an interlocutory appeal."); *see also* *Johnson v. Jones*, 515 U.S. 304, 313 (1995) (questions of "evidence sufficiency" or which facts a party may or may not be able to prove at trial are not reviewable); *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996); *Pellegrino v. United States*, 73 F.3d 934, 937 (9th Cir. 1996); *Thomas v. Gomez*, 143 F.3d 1246, 1248 (9th Cir. 1998).

iii. Successive Appeals from Orders Denying Immunity

There is "no jurisdictional bar to successive interlocutory appeals of orders denying successive pretrial motions on qualified immunity grounds." *Knox v. Southwest Airlines*, 124 F.3d 1103, 1106 (9th Cir. 1997) (appeal from second denial of summary judgment permissible despite failure to appeal first denial of

summary judgment); *see also* *Behrens v. Pelletier*, 516 U.S. 299, 308-10 (1996) (permitting appeal from denial of summary judgment despite prior appeal from denial of dismissal because "legally relevant factors" differ at summary judgment and dismissal stages).

h. Municipal Liability

Unlike an order denying qualified immunity to an individual officer, an order denying a local government's motion for summary judgment under *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978) is not immediately appealable. *See* *Collins v. Jordan*, 110 F.3d 1363, 1366 n.1 (9th Cir. 1996); *Henderson v. Mohave County*, 54 F.3d 592, 594 (9th Cir. 1995); *but see* *Huskey v. City of San Jose*, 204 F.3d 893, 903-904 (9th Cir. 2000) (court of appeals exercised pendent party jurisdiction over city's appeal from denial of its motion for summary judgment because the city's motion was inextricably intertwined with issues presented in officials' appeal).

i. Immunity from Service ("Specialty Doctrine")

An order denying a motion to dismiss based on an extradited person's claim of immunity from civil service of process under the "principle of specialty" is not immediately appealable. *See* *Van Cauwenberghe v. Biard*, 486 U.S. 517, 523-24 (1988) (claim of immunity under the principle of specialty effectively reviewable following final judgment because not founded on the right not to stand trial).

j. Settlement Agreement (Contractual Immunity)

An order vacating a dismissal predicated on litigants' settlement agreement is not immediately appealable. *See* *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 869 (1994) (rejecting contention that "right not to stand trial" created by private settlement agreement could not be effectively vindicated following final judgment).

k. Absolute Judicial Immunity

The denial of a claim of absolute judicial immunity is immediately appealable under the collateral order doctrine. *Meek v. County of Riverside*, 183 F.3d 962, 965 (9th Cir. 1999).

l. Absolute Political Immunity

The denial of a claim of absolute political immunity is not immediately appealable under the collateral order doctrine. *Meek v. County of Riverside*, 183 F.3d 962, 969 (9th Cir. 1999).

m. Absolute Witness Immunity

An order denying summary judgment based on assertion of absolute witness immunity is an appealable collateral order. *Paine v. City of Lompoc*, 265 F.3d 975, 980-81 (9th Cir. 2001).

n. Tribal Sovereign Immunity

An order denying a tribe's sovereign immunity claim is an appealable collateral order. *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1090 (9th Cir. 2007) (explaining that tribal sovereign immunity is an immunity to suit rather than a mere defense).

18. INJUNCTION

See II.B.1 (Interlocutory Injunctive Orders).

19. INTERVENTION

Certain orders denying leave to intervene under Rule 24 are final and appealable because they terminate the litigation as to the putative intervenor. *See* IX.A.2.a.i (regarding an intervenor's standing to appeal).

a. Intervention as of Right

i. Order Denying Intervention Altogether

An order denying a motion to intervene as of right is a final appealable order where the would-be intervenor is prevented from becoming a party in any respect. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987); *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997); *Petrol Stops Northwest v. Continental Oil Co.*, 647 F.2d 1005, 1009 (9th Cir. 1981). Moreover, an order denying a motion to intervene as of right or permissively is immediately appealable even though the would-be intervenors were granted amicus status. *See Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1491 & n.2 (9th Cir. 1995).

ii. Order Denying Intervention in Part

An order denying a motion to intervene as of right is not immediately appealable where permissive intervention granted. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375-78 (1987) (observing that litigant granted permissive intervention was party to action and could effectively challenge denial of intervention as of right, and conditions attached to permissive intervention, after litigation of the merits). Similarly, an order granting in part a motion to intervene as of right is not immediately appealable. *See Churchill County v. Babbitt*, 150 F.3d 1072, 1081-82 (9th Cir. 1998) (order granting intervention as of right as to remedial phase of trial appealable only after final judgment), *amended by* 158 F.3d 491 (9th Cir. 1998).

b. Permissive Intervention

Although an order denying permissive intervention has traditionally been held nonappealable, or appealable only if the district court has abused its discretion, "jurisdiction to review [such an order] exists as a practical matter because a consideration of the jurisdictional issue necessarily involves a consideration of the merits – whether an abuse of discretion occurred." *Benny v. England (In re Benny)*, 791 F.2d 712, 720-21 (9th Cir. 1986); *see also Canatella v. California*, 404 F.3d 1106, 1117 (9th Cir. 2005); *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1307-08 (9th Cir. 1997).

An order denying permissive intervention is appealable at least in conjunction with denial of intervention as of right. *See* *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1491 & n.2 (9th Cir. 1995) (concluding appellate jurisdiction existed where intervention as of right and permissive intervention denied, but amicus status granted).

c. Must Appeal Denial of Intervention Immediately

An order denying a motion to intervene as of right must be timely appealed following entry of the order. *See* *United States v. Oakland*, 958 F.2d 300, 302 (9th Cir. 1992) (dismissing appeal for lack of jurisdiction where appellant failed to appeal from denial of intervention as of right until after final judgment and neglected to move for leave to intervene for purposes of appeal).

20. MAGISTRATE JUDGE DECISIONS (28 U.S.C. § 636(c))

a. Final Judgment by Magistrate Appealed Directly to Court of Appeals

When a magistrate judge enters a final judgment under 28 U.S.C. § 636(c)(1), appeal is directly to the court of appeals. *See* 28 U.S.C. § 636(c)(3); Fed. R. Civ. P. 73(c). "An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment." Fed. R. App. P. 3(a)(3).

> *Cross-reference*: V.B.2.f (regarding reference to a magistrate judge under 28 U.S.C. § 636(b) for findings and recommendations rather than entry of final judgment).

b. No Appellate Jurisdiction if Magistrate Lacked Authority

A final judgment entered by a magistrate judge who lacked authority is not an appealable order. *See* *Tripati v. Rison*, 847 F.2d 548, 548-49 (9th Cir. 1988) (per curiam); *cf.* *Reynaga v. Cammisa*, 971 F.2d 414, 415 n.1, 418 (9th Cir. 1992) (treating attempted appeal as petition for writ of mandamus).

A magistrate judge lacks authority to enter a final judgment absent special designation by the district court, *see* *Tripati*, 847 F.2d at 548-49, and the uncoerced consent of the parties, *see* *Alaniz v. California Processors, Inc.*, 690 F.2d 717, 720 (9th Cir. 1982). *See also* *Kamakana v. City and County of Honolulu*, 447 F. 3d 1172, 1178 n.2 (9th Cir. 2006).

Where a magistrate judge acts without jurisdiction in purporting to enter a final judgment, the magistrate judge's lack of jurisdiction deprives this court of appellate jurisdiction. *Holbert v. Idaho Power Co.*, 195 F.3d 452, 454 (9th Cir. 1999) (order).

c. Parties' Consent to Entry of Final Judgment by Magistrate

If the record does not contain a "clear and unambiguous" statement that the parties consented to a magistrate exercising authority under § 636(c), only the district court has jurisdiction to enter an appealable judgment. *Alaniz v. California Processors, Inc.*, 690 F.2d 717, 720 (9th Cir. 1982) (holding that parties' consent to magistrate exercising authority under § 636(b) was insufficient to confer jurisdiction under § 636(c)); *see also* *Nasca v. Peoplesoft (In re Marriage of Nasca)*, 160 F.3d 578, 578 (9th Cir. 1998) ("[G]eneral orders from a district court that allow the court to infer consent from a failure to object are insufficient to manifest consent.").

A statement of consent should specifically refer to "trial before a magistrate" or "section § 636(c)," or contain equally explicit language. *SEC v. American Principals Holdings, Inc. (In re San Vicente Med. Partners, Ltd.)*, 865 F.2d 1128, 1130 (9th Cir. 1989) (concluding that stipulation to have dispute heard before a named district court judge or "anyone" that judge deems appropriate was insufficient).

Voluntary consent may be implied in limited, exceptional circumstances. *See* *Roell v. Withrow*, 538 U.S. 580, 589 (2003). In *Roell*, the parties behavior as reflected in the record "clearly implied their consent" and showed their voluntary participation in the proceedings before the magistrate judge. *See id.* at 584, *cf.* *Anderson v. Woodcreek Venture Ltd.*, 351 F.3d 911, 919 (9th Cir. 2003) (even though she signed the consent form, pro se plaintiff's voluntary consent to proceed

before magistrate judge could not be implied where she twice refused to consent, consent form did not advise her that she could withhold consent, and she only consented after the court denied her motion to reject magistrate judge's jurisdiction).

Clear and unambiguous stipulations on the pretrial statement may constitute consent to proceed before a magistrate judge. *Gomez v. Vernon*, 255 F.3d 1118, 1125 (9th Cir. 2001).

The parties' express oral consent to a magistrate judge's authority is sufficient to grant the magistrate judge authority to enter final judgment. *Kofoed v. International Bhd. of Elec. Workers*, 237 F.3d 1001, 1004 (9th Cir. 2001).

Consent to a magistrate judge's jurisdiction may also be given by a "virtual representative." *See Irwin v. Mascott*, 370 F.3d 924, 929-31 (9th Cir. 2004).

A defendant's lack of proper consent to the magistrate judge's entry of final judgment cannot not be cured by the defendant expressly consenting on appeal to the magistrate judge's exercise of authority. *Hajek v. Burlington N. R.R. Co.*, 186 F.3d 1105, 1108 (9th Cir. 1999).

> *Cross-reference*: V.B.2.f (regarding objections to order of reference and to purposed findings and recommendations in matters referred to a magistrate judgment under 28 U.S.C. § 636(b) rather than § 636(c)).

21. POST-JUDGMENT ORDERS

a. Post-Judgment Orders Generally Final

A post-judgment order may be final and appealable "(1) as an 'integral part' of the final judgment on the merits even though not entered concurrently with that judgment; (2) as an independent final order in a single case involving two 'final' decisions; or (3) as a collateral interlocutory order subject to immediate review under *Cohen*, if it is viewed as preliminary to a later proceeding." *United States v. One 1986 Ford Pickup*, 56 F.3d 1181, 1184-85 (9th Cir. 1995) (per curiam).

The finality rule must be given a practical construction, particularly in the context of post-judgment orders. *See* *United States v. Washington*, 761 F.2d 1404, 1406 (9th Cir. 1985). Permitting immediate appeal of post-judgment orders creates little risk of piecemeal review and may be the only opportunity for meaningful review. *See* *One 1986 Ford Pickup*, 56 F.3d at 1184-85; *see also* *Diaz v. San Jose Unified Sch. Dist.*, 861 F.2d 591, 594 (9th Cir. 1988) (concluding that post-judgment order approving student assignment plan pursuant to previously entered desegregation order was appealable); *Washington*, 761 F.2d at 1406-07 (9th Cir. 1985) (concluding that post-judgment order adopting interim plan allocating fishing rights was final and appealable).

However, a post-judgment order cannot be final if the underlying judgment is not final. *See* *Branson v. City of Los Angeles*, 912 F.2d 334, 336 (9th Cir. 1990) (stating that denial of motion to alter nonfinal judgment is effectively a reaffirmation of that judgment).

Cross-reference: II.A.1 (regarding finality generally).

b. Separate Notice of Appeal Generally Required

Unless a post-judgment order is appealed at the same time as the judgment on the merits, a separate notice of appeal is generally required to challenge the post-judgment order. *See* *Whitaker v. Garcetti*, 486 F.3d 572, 585 (9th Cir. 2007) (finding no jurisdiction over order denying attorney's fees where no separate notice of appeal filed); *Farley v. Henderson*, 883 F.2d 709, 712 (9th Cir. 1989) (per curiam)(finding no jurisdiction over order awarding attorney's fees where no separate notice of appeal filed); *Culinary & Serv. Employees Local 555 v. Hawaii Employee Benefit Admin., Inc.*, 688 F.2d 1228, 1232 (9th Cir. 1982) (same).

Cross-reference: III.F.2 (regarding notice of appeal from post-judgment tolling motions), III.F.3 (regarding notice of appeal from non-tolling post-judgment motions).

c. Appealability of Specific Post-Judgment Orders

i. Post-Judgment Order Granting or Denying Attorney's Fees

An order granting or denying a post-judgment motion for attorney's fees is generally an appealable final order. *See* *United States ex rel. Familian Northwest, Inc. v. RG & B Contractors, Inc.*, 21 F.3d 952, 954-55 (9th Cir. 1994); *International Ass'n of Bridge, Structural, Ornamental, & Reinforcing Ironworkers' Local Union 75 v. Madison Indus., Inc.*, 733 F.2d 656, 659 (9th Cir. 1984). An order awarding periodic attorney's fees for monitoring compliance with a consent decree is also a final appealable order. *See* *Madrid v. Gomez*, 190 F.3d 990, 994 n.4 (9th Cir. 1999), *superseding* *Madrid v. Gomez*, 150 F.3d 1030 (9th Cir. 1998); *Gates v. Rowland*, 39 F.3d 1439, 1450 (9th Cir. 1994). A periodic fee award made during the remedial phase of a prisoner civil rights case is appealable if it disposes of the attorney's fees issue for the work performed during the time period covered by the award. *See* *Madrid*, 190 F.3d at 994 n.4.

However, "an award of attorney's fees does not become final until the amount of the fee award is determined." *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 617 (9th Cir. 1993).

ii. Post-Judgment Order Granting or Denying Costs

A post-judgment order granting or denying a motion for costs is final and appealable. *See* *Burt v. Hennessey*, 929 F.2d 457, 458 (9th Cir. 1991).

iii. Post-Judgment Order Granting or Denying New Trial

An order conditionally granting or denying a motion for new trial under Fed. R. Civ. P. 50(c) or (d) is reviewable in conjunction with an appeal from the grant or denial of a renewed motion for judgment as a matter of law under Fed. R. Civ. P. 50(b). *See* *Neely v. Martin K. Elby Constr. Co.*, 386 U.S. 317, 322-24 (1967); *Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241, 1248 (9th Cir. 1998); *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 190 & n.15 (9th Cir. 1989).

However, an order unconditionally granting a motion for new trial is not appealable. *See* *Schudel v. General Elec. Co.*, 120 F.3d 991, 995 n.9 (9th Cir. 1997), *abrogated on other grounds by* *Weisgram v. Marley Co.*, 528 U.S. 440 (2000) (involving order granting new trial under Fed. R. Civ. P. 50(b)); *Roy v. Volkswagenwerk Aktiengesellschaft*, 781 F.2d 670, 671 (9th Cir. 1985) (per curiam) (involving order granting new trial under Fed. R. Civ. P. 59).

iv. Post-Judgment Orders Related to Discovery

An order granting a motion to enforce a settlement agreement and seal court files, and denying a motion to compel production of documents, is final and appealable. *See* *Hagestad v. Tragesser*, 49 F.3d 1430, 1432 (9th Cir. 1995).

Similarly, an order granting intervenors' motion, after settlement and dismissal, to modify a protective order to permit intervenors access to deposition transcripts is appealable. *See* *Beckman Indus. v. International Ins. Co.*, 966 F.2d 470, 472 (9th Cir. 1992).

> *Cross-reference*: II.C.12.a.iv (regarding discovery-related orders issued afer entry of judgment in underlying proceeding).

v. Post-Judgment Contempt Orders

An order of contempt for violation of previously entered judgment is final and appealable. *See* *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1393-94 (9th Cir. 1991); *Stone v. San Francisco*, 968 F.2d 850, 854 (9th Cir. 1992) (consent decree).

> *Cross-reference*: II.C.10.b (regarding contempt or sanctions order entered after final judgment in underlying action).

vi. Orders Granting or Denying Fed. R. Civ. P. 60(b) Relief

An order granting or denying relief under Fed. R. Civ. P. 60 is final and appealable. *See* *Harman v. Harper*, 7 F.3d 1455, 1457 (9th Cir. 1993). *But see* *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1386 n.2 (9th Cir.

1984) (dismissing appeal from denial of 60(b) motion because district court lacked jurisdiction to consider motion). Additionally, the denial of a motion to vacate a consent decree under 60(b) is final and appealable under 28 U.S.C. § 1291. *See Jeff D. v. Kempthorne*, 365 F.3d 844, 849-50 (9th Cir. 2004).

A vacatur of a judgment in response to a Rule 60(b) order is not a final judgment. *Ballard v. Baldridge*, 209 F.3d 1160, 1161 (9th Cir. 2000) (order).

vii. Other Post-Judgment Orders

An order granting or denying a motion for extension of time to appeal is final and appealable. *See Corrigan v. Bargala*, 140 F.3d 815, 817 (9th Cir. 1998); *Diamond v. United States Dist. Court*, 661 F.2d 1198, 1198 (9th Cir. 1981) (order).

An order issuing a certificate of reasonable cause after dismissal of a forfeiture action is also appealable. *See United States v. One 1986 Ford Pickup*, 56 F.3d 1181, 1184-85 (9th Cir. 1995).

22. PRE-FILING REVIEW ORDER

"[P]re-filing orders entered against vexatious litigants are not conclusive and can be reviewed and corrected (if necessary) after final judgment," and thus are not immediately appealable. *See Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1055-56 (9th Cir. 2007) (holding that "pre-filing orders entered against vexatious litigants are [] not immediately appealable"). *But see Moy v. United States*, 906 F.2d 467, 469-71 (9th Cir. 1990) (pre-*Cunningham v. Hamilton County*, 527 U.S. 198 (1999) case that states, "The district court's order is most aptly characterized as a final order precluding the clerk from accepting papers from [appellant] without leave of court.").

Cross-reference: II.C.3 (regarding appointment of counsel); II.C.15 (regarding forma pauperis status).

23. RECEIVERSHIP

See II.B.2 (Interlocutory Receivership Orders).

24. REMAND

Cross-reference: II.C.24.a (regarding orders remanding to state court); II.C.24.b (regarding orders remanding to federal agencies); II.C.24.c (regarding orders denying petitions for removal from state court); II.C.24.d (regarding orders denying motions to remand to state court).

a. Order Remanding to State Court

Under 28 U.S.C. § 1447(d), an order remanding a removed action to state court for lack of subject matter jurisdiction or a defect in removal procedure is not reviewable on appeal or otherwise. *See* 28 U.S.C. § 1447(d); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995) ("only remands based on grounds specified in § 1447(c) are immune from review" under § 1447(d)) (citations omitted); *Kunzi v. Pan Am. World Airways, Inc.*, 833 F.2d 1291, 1293 (9th Cir. 1987). Note that the court of appeals does have jurisdiction to determine whether the district court had the authority under § 1447(c) to remand. *See Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 938 (9th Cir. 2006).

Cross-reference: II.C.24.a.i (regarding remand due to defect in removal procedure); II.C.24.a.ii (regarding remand due to lack of subject matter jurisdiction); II.C.24.a.iii (regarding remand for reasons other than lack of subject matter jurisdiction or defect in removal procedure).

Section 1447(d) generally bars review of an order remanding an action to state court regardless of the statutory basis on which the action was originally removed to federal court. *See Things Remembered, Inc.*, 516 U.S. at 128. For example, § 1447(d) applies to actions removed under the general removal statute, *see* 28 U.S.C. § 1441(a); *Hansen v. Blue Cross of California*, 891 F.2d 1384, 1386 (9th Cir. 1989), and actions removed under the bankruptcy removal statute, *see* 28 U.S.C. § 1452(a); *Benedor Corp. v. Conejo Enters., Inc. (In re Conejo Enters., Inc.)*, 96 F.3d 346, 350-51 (9th Cir. 1996). However, § 1447(d) does not bar review of remand orders in certain civil rights actions, *see* 28 U.S.C. §§ 1443 & 1447(d); *Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006), or in actions involving the FDIC, *see* 12 U.S.C. § 1819(b)(2)(c) (stating that the FDIC may

appeal any order of remand entered by any United States District Court); *Maniar v. FDIC*, 979 F.2d 782, 784-85 & nn. 1,2 (9th Cir. 1992).

In determining the grounds for remand, the court of appeals looks to the substance of the remand order. *See United Investors Life Ins. Co. v. Waddell & Reed Inc.*, 360 F.3d 960, 964 (9th Cir. 2004) (although the district court did not explicitly identify the specific grounds for remand, the court of appeals examined the "full record before the district court to ascertain the court's 'actual reason' for remanding."). The district court's characterization of its authority for remand is not controlling. *See Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co.*, 940 F.2d 550, 553 (9th Cir. 1991); *Kunzi v. Pan Am. World Airways, Inc.*, 833 F.2d 1291, 1293 (9th Cir. 1987).

i. Remand Due to Defect in Removal Procedure

An order of remand premised on a defect in removal procedure is not reviewable if the motion to remand was timely filed under 28 U.S.C. § 1447(c). *See Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995) (holding remand order not reviewable because motion to remand filed within 30 days of removal). Thus, the court of appeals must determine whether a defect in removal procedure was timely raised. *See Northern California Dist. Council of Laborers v. Pittsburgh-Des Moines Steel Co.*, 69 F.3d 1034, 1038 (9th Cir. 1995) (stating that if defect in removal procedure not timely raised, district court lacked power under § 1447(c) to order remand).

ii. Remand Due to Lack of Subject Matter Jurisdiction

An order of remand premised on lack of subject matter jurisdiction is not reviewable. *See Levin Metals, Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1315 (9th Cir. 1986). The district court's underlying conclusions regarding the existence of subject matter jurisdiction are also immune from review. *See Hansen v. Blue Cross of California*, 891 F.2d 1384, 1388 (9th Cir. 1989). However, a substantive determination made prior to, or in conjunction with, remand may be reviewable under the collateral order doctrine if it is separate from any jurisdictional determination. *See Gallea v. United States*, 779 F.2d 1403, 1404

(9th Cir. 1986) (concluding that pre-remand order dismissing United States was reviewable). For example:

- Review of order remanding due to lack of complete diversity barred by § 1447(d). *See* *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, 723 (1977) (per curiam) (mandamus relief not available).

- Review of order remanding due to lack of federal question jurisdiction barred by § 1447(d). *See* *Krangel v. General Dynamics Corp.*, 968 F.2d 914, 915-16 (9th Cir. 1992) (per curiam) (order not reviewable despite certification under § 1292(b)); *Levin Metals, Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1315 (9th Cir. 1986) (simultaneous order dismissing counterclaim reviewable because counterclaim had independent basis for federal jurisdiction).

- Review of order remanding due to lack of subject matter jurisdiction barred by § 1447(d), but order dismissing party prior to remand reviewable because "[t]o hold otherwise would immunize the dismissal from review." *Gallea*, 779 F.2d at 1404(pre-remand order dismissing United States reviewable); *see also* *Nebraska, ex rel., Department of Soc. Servs. v. Bentson*, 146 F.3d 676, 678 (9th Cir. 1998) (pre-remand order dismissing IRS reviewable).

- Review of order remanding due to lack of complete federal preemption barred by § 1447(d). *See* *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1180-81 (9th Cir. 1989) (underlying determination that the LMRA and ERISA did not completely preempt state law also unreviewable); *Hansen*, 891 F.2d at 1387 (underlying determination that ERISA did not apply, though "clearly wrong," also unreviewable).

- Review of an order remanding due to violation of the minimum amount in controversy requirement for diversity jurisdiction is barred by 28 U.S.C. § 1447(d). *McCauley v. Ford Motor Co.*, 264 F.3d 952, 964-65 (9th Cir. 2001).

- A district court's remand order, based on a finding that ERISA did not completely preempt former employee's state law claims against employer and therefore federal subject matter jurisdiction was lacking, was unreviewable on appeal. *Lyons v. Alaska Teamsters Employers Serv. Corp.*, 188 F.3d 1170, 1173-74 (9th Cir. 1999).

- A district court's order remanding an administrative forfeiture proceeding to state court, primarily for lack of subject matter jurisdiction, was unreviewable on appeal. *Yakima Indian Nation v. State of Wash. Dep't of Revenue*, 176 F.3d 1241, 1248 (9th Cir. 1999).

- A district court's order remanding to state court a class action suit alleging that stock broker misled investors about its on-line trading system because district court lacked subject matter jurisdiction and remand was not discretionary, was unreviewable on appeal. *Abada v. Charles Schwab & Co., Inc.*, 300 F.3d 1112 (9th Cir. 2002).

iii. Remand for Reasons Other than Lack of Subject Matter Jurisdiction or Defect in Removal Procedure

Section 1447(d) does not bar review of an order remanding an action to state court for reasons other than lack of subject matter jurisdiction or a defect in removal procedure. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712-15 (1996); *see also Williams v. Costco Wholesale Corp.*, 471 F.3d 975, 976 n.3 (9th Cir. 2006) (per curiam). Section 1447(d) also does not bar review of an order remanding state law claims on discretionary grounds despite the existence of supplemental jurisdiction over the claims in federal court. *See Scott v. Machinists Auto. Trades Dist. Lodge 190*, 827 F.2d 589, 592 (9th Cir. 1987) (per curiam).

A remand order not based on lack of subject matter jurisdiction or a defect in removal procedure is reviewable if it satisfies some basis for appellate jurisdiction. *See Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995). A remand order is appealable as a collateral order under 28 U.S.C. § 1291 if it conclusively determines a disputed question separate from the merits and is effectively unreviewable on appeal from final judgment, or if it puts parties "effectively out of court" by depriving them of a federal forum. *See Quackenbush*, 517 U.S. at 712-

13; *Snodgrass v. Provident Life & Accident Ins. Co.*, 147 F.3d 1163, 1165-66 (9th Cir. 1998); *Huth v. Hartford Ins. Co. of the Midwest*, 298 F.3d 800, 802 (9th Cir. 2002). An order remanding pendent state law claims is a reviewable order. *California Dept. of Water Resources v. Powerex Corp.*, 533 F.3d 1087, 1091-96 (9th Cir. 2008), *overruling* *Executive Software N.A., Inc. v. United States Dist. Court*, 24 F.3d 1545, 1549-50 (9th Cir. 1994) *and* *Lee v. City of Beaumont*, 12 F.3d 933, 936 (9th Cir. 1993).

The following orders (remanding to state court for reasons other than lack of subject matter jurisdiction or a defect in removal procedure) were deemed reviewable by the court of appeals on the jurisdictional basis specified in each case:

- District court's discretionary decision to decline supplemental jurisdiction and remand pendent state claims is reviewable under 28 U.S.C. § 1291. *See* *California Dept. of Water Resources*, 533 F.3d at 1096. Note in October 2008 the Supreme Court granted certiorari in *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, No. 07-1437 which concerns this issue.

- Remand order based on merits determination that employee handbook authorized plaintiff to choose forum reviewable under 28 U.S.C. § 1291. *See* *Clorox Co. v. United States Dist. Court*, 779 F.2d 517, 520 (9th Cir. 1985).

- Remand order premised on merits determination that contractual forum selection clause was valid and enforceable reviewable under the collateral order doctrine. *See* *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 277 (9th Cir. 1984); *see also* *Northern California Dist. Council of Laborers v. Pittsburgh-Des Moines Steel Co.*, 69 F.3d 1034, 1036 n.1 (9th Cir. 1995); *Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co.*, 940 F.2d 550, 553 (9th Cir. 1991) (reviewing order of remand premised on forum selection clause without explicitly discussing basis for jurisdiction).

- Remand order premised on abstention doctrine reviewable under the collateral order doctrine. *See* *Quackenbush*, 517 U.S. at 712-13

(*Burford* abstention); *Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969, 970 (9th Cir. 1992) (*Colorado River* abstention).

- Remand order issued pursuant to discretionary jurisdiction provision of Declaratory Judgment Act reviewable under the collateral order doctrine. *See Snodgrass*, 147 F.3d at 1165-66.

- Order remanding pendent state law claims, following grant of summary judgment as to federal claims, reviewable. *See Scott*, 827 F.2d at 592 (basis for appellate jurisdiction not expressly stated).

- Order remanding pendent state law claims, following amendment deleting grounds for removal to federal court, reviewable under 28 U.S.C § 1292(b) pursuant to district court certification. *See National Audubon Soc'y v. Department of Water*, 869 F.2d 1196, 1205 (9th Cir. 1989).

- The court of appeals has jurisdiction to review an award of sanctions upon remand. *Gibson v. Chrysler Corp.*, 261 F.3d 927, 932 (9th Cir. 2001).

b. Order Remanding to Federal Agency

An order remanding an action to a federal agency is generally not considered a final appealable order. *See Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990). However, such an order is considered final where: "(1) the district court conclusively resolves a separable legal issue, (2) the remand order forces the agency to apply a potentially erroneous rule which may result in a wasted proceeding, and (3) review would, as a practical matter, be forceclosed if an immediate appeal were unavailable." *Id.*

i. Remand to Federal Agency on Factual Grounds

A remand order requiring an agency to clarify its decision on a factual issue is not final. *See Gilcrist v. Schweiker*, 645 F.2d 818, 819 (9th Cir. 1981) (per curiam). Similarly, a remand order permitting an agency to fully develop the facts is not final. *See Eluska v. Andrus*, 587 F.2d 996, 1000-01 (9th Cir. 1978).

ii. Remand to Federal Agency on Legal Grounds

A remand order requiring an agency to apply a different legal standard is generally considered a final appealable order. *See* *Stone v. Heckler*, 722 F.2d 464, 466-68 (9th Cir. 1983); *see also* *Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990) ("[F]ailure to permit immediate appeal might foreclose review altogether: Should the Secretary lose on remand, there would be no appeal, for the Secretary cannot appeal his own agency's determinations.")

Under this principle, the following remand orders have been held appealable:

- Order reversing denial of social security benefits due to application of erroneous legal standard, and remanding to Secretary of Health and Human Services for further proceedings. *See* *Stone*, 722 F.2d at 467-68 (permitting Secretary to appeal remand order); *Rendleman v. Shalala*, 21 F.3d 957, 959 & n.1 (9th Cir. 1994).

- Order reversing denial of social security benefits because legal conclusion inadequately supported by factual record, and remanding to Secretary of Health and Human Services for further proceedings. *See* *Forney v. Apfel*, 524 U.S. 266, 272 (1998) (permitting claimant to appeal remand order).

- Order reversing denial of land conveyance based on interpretation of federal statute, and remanding to Interior Board of Land Appeals. *See* *Chugach Alaska Corp.*, 915 F.2d at 456-57 (Security permitted to appeal remand order).

- Order reversing denial of fees because agency erroneously concluded the Equal Access of Justice Act did not apply to the proceedings, and remanding to Interior Board of Land Appeals. *See* *Collord v. U.S. Dep't of the Interior*, 154 F.3d 933, 935 (9th Cir. 1998).

- "Unusual remand order" to Provider Reimbursement Review Board for consideration of jurisdiction over potential wage index claim "if [plaintiff] chooses to pursue this avenue" was appealable where

plaintiff did not seek, and chose not to pursue, remand. *See* *Skagit County Pub. Hosp. Dist. No. 2 v. Shalala*, 80 F.3d 379, 384 99th Cir. 1996) (after vacating partial remand, court of appeals concluded judgment was final and reviewed dismissal of remaining claims for lack of subject matter jurisdiction).

c. Order Denying Petition for Removal from State Court

An order denying a petition for removal under 28 U.S.C. § 1446(d) is reviewable under the collateral order doctrine. *See* *Ashland v. Cooper*, 863 F.2d 691, 692 (9th Cir. 1988) (concluding that order requiring litigant who had been granted in forma pauperis status to post a removal bond was reviewable).

d. Order Denying Motion to Remand to State Court

An order denying a motion to remand is not a final decision and does not fall under the collateral order doctrine. *See* *Bishop v. Bechtel Power Corp. (Estate of Bishop)*, 905 F.2d 1272, 1274-75 (9th Cir. 1990) (stating that order denying remand could be reviewed on appeal from final judgment). *But see* *San Francisco v. PG&E Corp.*, 433 F.3d 1115, 1120 (9th Cir. 2006) (explaining that the general rule that the denial of a motion to remand is not a final decision, does not apply if a district court's order effectively ends the litigation or sends a party out of court).

Cross-reference: V.A.1.b.v (regarding the reviewability of certain orders denying remand during an appeal from final judgment); V.A.2.b (regarding the reviewability of an order denying remand during an appeal from an injunctive order under 28 U.S.C. § 1292(a)(1)).

25. SANCTIONS

See II.C.10 (Contempt and Sanctions).

26. STAYS

Generally, orders granting or denying stays are not appealable final orders under 28 U.S.C. § 1291. *See* *Silberkleit v. Kantrowitz*, 713 F.2d 433, 434 (9th Cir. 1983). However, such orders are appealable under certain circumstances, including where the order places the parties "effectively out of court." *Id.* (citation omitted).

a. Stay Granted

i. Abstention-Based Stays

The following orders, granting abstention-based stays, are appealable under 28 U.S.C. § 1291 because their effect is to deprive the parties of a federal forum:

- Order granting a stay under the *Colorado River* doctrine. *See* *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 11-13 (1983); *Neuchatel Swiss Gen. Ins. Co. v. Lufthansa Airlines*, 925 F.2d 1193, 1194 n.1 (9th Cir. 1991); *see also* *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1102 (9th Cir. 2005) (exercising jurisdiction under the *Moses H. Cone* doctrine where district court order granting a stay of Attorney General's Clayton Act suit against Chapter 11 debtor pending resolution of the debtor's bankruptcy case effectively put the Attorney General out of court).

- Order granting a stay under the *Burford* abstention doctrine. *See* *Tucker v. First Maryland Sav. & Loan, Inc.*, 942 F.2d 1401, 1402, 1405 (9th Cir. 1991) (noting that *Burford* abstention doctrine generally mandates dismissal, not stay).

- Order granting a stay under the *Pullman* abstention doctrine. *See* *Confederated Salish v. Simonich*, 29 F.3d 1398, 1407 (9th Cir. 1994) (stating that stay order was also appealable under 28 U.S.C. § 1292(a)(1)).

- Order granting a stay under the *Younger* abstention doctrine. *See* *Confederated Salish v. Simonich*, 29 F.3d 1398, 1401 (9th Cir. 1994)

(noting that when the *Younger* abstention doctrine is applicable, the district court is required to dismiss the action).

Cross-reference: II.C.13 (regarding abstention-based dismissals); II.C.24 (regarding abstention-based remands).

ii. Other Stays

The following orders, granting stays on grounds other than abstention, are appealable on the grounds stated:

- Order staying federal claims pending resolution of dismissed pendent state claims in state court is appealable under § 1292(a)(1). *See* *Privitera v. California Bd. of Med. Quality Assurance*, 926 F.2d 890, 893-94 (9th Cir. 1991) (determining stay was appealable because it had effect of denying injunctive relief, without reaching finality issue).

  Cross-reference: II.B.1 (regarding interlocutory injunctive orders).

- Order by Benefits Review Board staying award of compensation benefits, despite statutory policy that benefits be paid promptly, is appealable under 33 U.S.C. § 921(c), which permits review of final decisions by the Board. *See* *Edwards v. Director, Office of Workers' Compensation Programs*, 932 F.2d 1325, 1327 (9th Cir. 1991).

- Order staying federal civil rights action indefinitely pending exhaustion of habeas corpus remedies is appealable. *See* *Marchetti v. Bitterolf*, 968 F.2d 963, 966 (9th Cir. 1992). *But see* *Alexander v. Arizona*, 80 F.3d 376, 376 (9th Cir. 1996) (order) (holding that order staying civil rights action for 90 days to permit exhaustion of prison administrative remedies was not appealable).

  Cross-reference: II.C.4 (regarding the appealability of a stay pending arbitration in an action governed by the Federal Arbitration Act, 9 U.S.C. § 16).

b. Stay Denied

The following orders denying stays are not immediately appealable because they do not satisfy the collateral order doctrine:

- Order denying a stay under the *Colorado River* doctrine. *See* *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 278 (1988) (observing that order is inherently tentative because "denial of such a motion may indicate nothing more than that the district court is not completely confident of the propriety of a stay. . . at the time").

- Order denying a stay under the *Burford* abstention doctrine. *See* *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1382 (9th Cir. 1997).

- Order denying a stay under the *Younger* abstention doctrine. *See* *Confederated Salish v. Simonich*, 29 F.3d 1398, 1401 (9th Cir. 1994).

- Order denying motion to stay a removed state law foreclosure proceeding under federal statute. *See Federal Land Bank v. L.R. Ranch Co.*, 926 F.2d 859, 864 (9th Cir. 1991) (concluding that validity of defendant's statutory defense, which was the basis for the stay motion, could be effectively reviewed after final judgment).

  Cross-reference: II.C.4 (regarding the appealability of an order denying a stay pending arbitration in an action governed by the Federal Arbitration Act, 9 U.S.C. § 16).

27. SUMMARY JUDGMENT

a. Order Denying Summary Judgment

An order denying a motion for summary judgment is generally an unappealable interlocutory order. *See* *Hopkins v. City of Sierra Vista*, 931 F.2d 524, 529 (9th Cir. 1991); *see also* *Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688, 694 n.2 (9th Cir. 1991) (stating that order denying summary judgment may in certain instances be reviewed on appeal from final

judgment); *Carey v. Nevada Gaming Control Bd.*, 279 F.3d 873, 877 n.1 (9th Cir. 2002) (same).

However, an order denying summary judgment on the grounds of immunity may be appealable under the collateral order doctrine. *See* II.C.17.

b. Order Granting Partial Summary Judgment

Generally, an order granting partial summary judgment is not an appealable final order. *See Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073, 1074 (9th Cir. 1994).

However, an order granting partial summary judgment may be immediately appealable if:

- Order is properly certified under Fed. R. Civ. P. 54(b). *See Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991); II.A.3.

- Order has the effect of denying an injunction under 28 U.S.C. § 1292(a)(1). *See American Tunaboat Ass'n. v. Brown*, 67 F.3d 1404, 1406 (9th Cir. 1995); II.B.1.

- Order satisfies the practical finality doctrine. *See Service Employees Int'l Union, Local 102 v. County of San Diego*, 60 F.3d 1346, 1349-50 (9th Cir. 1995); II.A.1.d.

28. TAX

See VII.C (Tax Court Decisions).

29. TRANSFER

a. Transfer from District Court to District Court

An order transferring an action from one district court to another is generally not appealable, but may be reviewed upon petition for writ of mandamus. *See Sunshine Beauty Supplies, Inc. v. United States Dist. Court*, 872 F.2d 310 (9th Cir.

1989), *abrogated on other grounds by* *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193 (2000) (issuing writ of mandamus).

> *Cross-reference*: II.D.4.h (regarding the availability of mandamus relief from transfer orders).

b. Transfer from District Court to Court of Appeals

An order transferring an action from the district court to the court of appeals due to lack of subject matter jurisdiction is appealable under 28 U.S.C. § 1291. *See* *Carpenter v. Department of Transp.*, 13 F.3d 313, 314 (9th Cir. 1994) (explaining that district court transferred action under 28 U.S.C. § 1631 on the grounds that the court of appeals had exclusive jurisdiction to review regulation issued by Federal Highway Administration).

D. PETITION FOR WRIT OF MANDAMUS

1. GENERALLY

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651.

The burden is on a petitioner seeking a writ to show that his or her "right to the writ is clear and indisputable." *Calderon v. United States Dist. Court*, 103 F.3d 72, 74 (9th Cir. 1996) (citation omitted). Ordinarily, where a decision is within the district court's discretion, "it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam).

2. *BAUMAN* FACTORS

The court of appeals considers the presence or absence of the following five factors in evaluating a petition for writ of mandamus:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. (2)

> The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first.) (3) The district court's order is clearly erroneous as a matter of law. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems, or issues of law of first impressions.

Credit Suisse v. United States Dist. Court, 130 F.3d 1342, 1345 (9th Cir. 1997) (quoting *Bauman v. United States Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977)).

"None of these guidelines is determinative and all five guidelines need not be satisfied at once for a writ to issue." *Credit Suisse*, 130 F.3d at 1345 (only in rare cases will all guidelines point in the same direction or even be relevant) "[I]ssuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr v. United States Dist. Court*, 426 U.S. 394, 403 (1976).

Note that the guidelines for issuing a writ are more flexible when the court of appeals exercises its supervisory mandamus authority, which is invoked in cases "involving questions of law of major importance to the administration of the district courts." *Arizona v. United States Dist. Court (In re Cement Antitrust Litig.)*, 688 F.2d 1297, 1303, 1307 (9th Cir. 1982) (showing of actual injury and ordinary error may suffice).

a. Alternative Relief Unavailable

"A writ of mandamus is an extraordinary remedy that is not available when the same review may be obtained through contemporaneous ordinary appeal." *Snodgrass v. Provident Life And Accident Ins. Co.*, 147 F.3d 1163, 1165 (9th Cir. 1998) (internal quotations and citation omitted); *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court*, 859 F.2d 1354, 1357 (9th Cir. 1988).

The availability of review under 28 U.S.C. § 1291, as a final or collateral order, precludes review by mandamus. *See Snodgrass*, 147 F.3d at 1165-66. The availability of review under 28 U.S.C. § 1292(a) also precludes review by

mandamus. *See* *Calderon v. United States Dist. Court*, 137 F.3d 1420, 1422 (9th Cir. 1998) (order prohibiting California from extraditing defendant to Missouri appealable as an injunction under § 1292(a)(1)). Moreover, failure to file a timely notice of appeal from an appealable order generally precludes mandamus relief. *See* *Demos v. United States Dist. Court*, 925 F.2d 1160, 1161 n.3 (9th Cir. 1991) ('[M]andamus may not be used as a substitute for an untimely notice of appeal.").

However, failure to seek certification under 28 U.S.C. § 1292(b) does not preclude mandamus relief. *See* *Executive Software North Am., Inc. v. United States Dist Court*, 24 F.3d 1545, 1550 (9th Cir. 1994) (stating that permissive appeal under § 1292(b) is not a "contemporaneous ordinary appeal"), *overruled on other grounds by California Dep't of Water Resources v. Powerex Corp.*, 533 F.3d 1087 (9th Cir. 2008).

b. Possibility of Irreparable Damage or Prejudice

The second *Bauman* factor, which is closely related to the first, is satisfied by "severe prejudice that could not be remedied on direct appeal." *Credit Suisse v. United States Dist. Court*, 130 F.3d 1342, 1346 (9th Cir. 1997) (finding severe prejudice where an order compelling a bank to respond to discovery requests forced the bank to choose between contempt of court and violation of Swiss banking secrecy and penal laws); *see also* *Philippine Nat'l Bank v. United States Distr. Court*, 397 F.3d 768, 774 (9th Cir. 2005) (finding severe prejudice where bank would be forced to choose between violating Philippine law and contempt of court); *Medhekar v. United States Dist. Court*, 99 F.3d 325, 326-27 (9th Cir. 1996) (per curiam) (finding irreparable harm where an order compelled defendants in a securities fraud action to undergo the burden and expense of initial disclosures prior to the district court ruling on a motion to dismiss because the issue would be moot on appeal from final judgment).

In a supervisory mandamus case, the injury requirement may be satisfied by a showing of "actual injury." *See* *Arizona v. United States Dist. Court (In re Cement Antitrust Litig.)*, 688 F.2d 1297, 1303, 1307 (9th Cir. 1982) (stating that supervisory authority is invoked in cases "involving questions of law of major importance to the administration of the district courts").

c. Clear Error by District Court

A petitioner's failure to show clear error may be dispositive of a petition for writ of mandamus. *See* *McDaniel v. United States Dist. Court*, 127 F.3d 886, 888 (9th Cir. 1997) (per curiam).

Note that in a supervisory mandamus case, the petitioner only needs to show an ordinary error, not clear error. *See* *Calderon v. United States Dist. Court*, 134 F.3d 981, 984 (9th Cir. 1998), *abrogated on other grounds as recognized by* *Jackson v. Roe*, 425 F.3d 654 (9th Cir. 2005); *Arizona v. United States Dist. Court (In re Cement Antitrust Litig.)*, 688 F.2d 1297, 1307 (9th Cir. 1982) (stating that supervisory authority is invoked in cases "involving questions of law of major importance to the administration of the district courts").

d. Potential for Error to Recur

The fourth and fifth *Bauman* factors will rarely both be present in a single case because one requires repetition and the other novelty. *See* *Armster v. United States Dist. Court*, 806 F.2d 1347, 1352 n.4 (9th Cir. 1987) ("Where one of two is present, the absence of the other is of little or no significance."). *But see* *Portillo v. United States Dist. Court*, 15 F.3d 819, 822 (9th Cir. 1994) (observing that presentence urine testing raised issue of first impression and that routine testing "will constitute an oft-repeated error").

e. Important Question of First Impression

Mandamus relief may be appropriate to settle an important question of first impression that cannot be effectively reviewed after final judgment. *See* *Medhekar v. United States Dist. Court*, 99 F.3d 325, 327 (9th Cir. 1996) (per curiam) (noting that where the fifth *Bauman* factor is present, the third and fourth factors generally will not be present).

The court of appeals often relies on its supervisory mandamus authority in cases raising an important question of law of first impression. *See* *Calderon v. United States Dist. Court*, 134 F.3d 981, 984 (9th Cir. 1998), *abrogated on other grounds as recognized by* *Jackson v. Roe*, 425 F.3d 654 (9th Cir. 2005); *Arizona v.*

United States Dist. Court (In re Cement Antitrust Litig.), 688 F.2d 1297, 1307 (9th Cir. 1982).

3. NOTICE OF APPEAL CONSTRUED AS PETITION FOR WRIT OF MANDAMUS

The court of appeals has discretion to construe an appeal as a petition for writ mandamus. *See* *Reynaga v. Cammisa*, 971 F.2d 414, 418 (9th Cir. 1992). However, the court will construe an appeal as a writ petition only in an "extraordinary case," *Lee v. City of Beaumont*, 12 F.3d 933, 936 (9th Cir. 1993), *overruled on other grounds by* *California Dep't of Water Resources v. Powerex Corp.*, 533 F.3d 1087 (9th Cir. 2008), and "mandamus may not be used as a substitute for an untimely notice of appeal," *Demos v. United States Dist. Court*, 925 F.2d 1160, 1161 n.3 (9th Cir. 1991).

In determining whether to construe an appeal as a petition, the court generally evaluates the appeal in light of the *Bauman* factors. *See* *Lee*, 12 F.3d at 936 *overruled on other grounds by* *California Dep't of Water Resources v. Powerex Corp.*, 533 F.3d 1087 (9th Cir. 2008).

a. Appeal Construed as Petition for Writ of Mandamus

An appeal has been construed as a petition where three *Bauman* factors were clearly present in an appeal from an order appointing a special master to monitor compliance with a previously entered injunction. *See* *National Org. for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 542 (9th Cir. 1987) (denying petition).

An appeal has been construed as a petition where a magistrate judge issued a stay it had no authority to issue and the petitioner was a pro se inmate likely powerless to prevent the invalid stay order from being enforced. *See* *Reynaga v. Cammisa*, 971 F.2d 414, 418 (9th Cir. 1992) (granting petition without discussing *Bauman* factors).

An appeal has been construed as a petition where the district court's order allowed the defendant to disclose to the government communications between the defendant and co-defendants that occurred outside the presence of counsel. *United*

States v. Austin, 416 F.3d 1016, 1025 (9th Cir. 2005) (denying petition because the order was not clearly erroneous and the *Bauman* factors did not weigh in favor of granting the writ).

b. Appeal Not Construed as Petition for Writ of Mandamus

In *California Dep't of Water Resources v. Powerex Corp.*, 533 F.3d 1087, 1091-96 (9th Cir. 2008), the court held that a district court's discretionary decision to decline supplemental jurisdiction and remand, must be challenged pursuant to an appeal, rather than in a petition for writ of mandamus, *overruling* *Survival Sys. Div. of the Whittaker Corp. v. United States Dist. Court*, 825 F.2d 1416 (9th Cir. 1987), *Executive Software N.A., Inc. v. United States Dist. Court*, 24 F.3d 1545, 1549-50 (9th Cir. 1994) *and* *Lee v. City of Beaumont*, 12 F.3d 933, 936 (9th Cir. 1993).

The court of appeals declined to construe an appeal as a petition where no *Bauman* factors were present in an appeal from a discretionary remand of pendent state claims. *See* *Lee v. City of Beaumont*, 12 F.3d 933, 936-38 (9th Cir. 1993), *overruled on other grounds by* *California Dep't of Water Resources v. Powerex Corp.*, 533 F.3d 1087 (9th Cir. 2008).

4. AVAILABILITY OF MANDAMUS RELIEF FROM SPECIFIC ORDERS

a. Class Certification Orders

i. Fed. R. Civ. P. 23

Note that the following decisions should be considered in light of Fed. R. Civ. p. 23(f), which provides for permissive interlocutory appeal from class certification orders.

> *Cross-reference*: II.C.8 (regarding the appealability of class certification orders).

ii. Decisions Predating Fed. R. Civ. P. 23(f)

An order granting motion to certify a class, or denying a motion to amend an order certifying a class, may warrant mandamus relief. *See* *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1338 (9th Cir. 1976) (granting petition in part where district court clearly erred in certifying a class under Fed. R. Civ. P. 23); *McDonnell-Douglas Corp. v. United States Dist. Court*, 523 F.2d 1083, 1087 (9th Cir. 1975) (same). *But see* *Bauman v. United States Dist. Court*, 557 F.2d 650, 654-62 (9th Cir. 1977) (denying mandamus relief from order denying motion to delete certain provisions from class certification order).

However, the court of appeals "has not looked favorably upon granting extraordinary relief to vacate a class certification." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1232 (9th Cir. 1996).

b. Contempt Orders

A petition for writ of mandamus is an available avenue for relief from an order of civil contempt against a party to ongoing district court proceedings. *See* *Goldblum v. NBC*, 584 F.2d 904, 906 n.2 (9th Cir. 1978) (granting petition).

> *Cross-reference*: II.C.10 regarding the appealability of civil contempt orders against parties to ongoing district court proceedings).

c. Discovery Orders

i. Mandamus Relief Available

A petition for writ of mandamus is an available avenue for relief from certain discovery orders. *See* *United States v. Fei Ye*, 436 F.3d 1117, 1121-24 (9th Cir. 2006) (granting petition for writ of mandamus from order granting defendants' motion for pretrial deposition of the government's expert witnesses); *Medhekar v. United States Dist. Court*, 99 F.3d 325, 326-27 (9th Cir. 1996) (per curiam) (granting petition for writ of mandamus from order compelling defendants to make initial disclosures under Fed. R. Civ. P. 26(a)(1) despite statutory provision staying discovery in securities fraud actions pending disposition of motions to dismiss);

City of Las Vegas v. Foley, 747 F.2d 1294, 1296-97 (9th Cir. 1984) (granting petition for writ of mandamus from order prohibiting plaintiff from reopening discovery to depose city officials regarding their motives for enacting the zoning ordinance at issue).

Mandamus is particularly appropriate "for the review of orders compelling discovery in the face of assertions of absolute privilege." *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1491 (9th Cir. 1989) (granting petition for writ of mandamus from order compelling defendant to produce statements purportedly covered by the attorney-client privilege); *see also Taiwan v. United States Dist. Court*, 128 F.3d 712, 717-19 (9th Cir. 1997) (granting petition for writ of mandamus from order compelling deposition of foreign defendants despite claim of testimonial immunity under the Taiwan Relations Act).

ii. Mandamus Relief Not Available

A petition for writ of mandamus is not an available avenue for relief from certain discovery orders because other remedies are available. *See Bank of Am. v. Feldman (In re National Mortgage Equity Corp. Mortgage Pool Certificates)*, 821 F.2d 1422, 1425 (9th Cir. 1987) (concluding mandamus relief inappropriate where privileged information has already been disclosed and any possible remedy is available on appeal from final judgment); *Belfer v. Pence*, 435 F.2d 121, 122-23 (9th Cir. 1970) (concluding mandamus relief inappropriate where nonparty has option of defying discovery order and appealing from subsequent contempt citation); *Guerra v. Board of Trustees*, 567 F.2d 352, 355 (9th Cir. 1977) (concluding mandamus relief inappropriate because less drastic remedies appeared available where district court had not shown unwillingness to protect confidentiality of documents by other means).

> *Cross-reference*: II.C.12 (regarding the appealability of discovery-related orders).

d. Disqualification Orders

i. Disqualification of Judge

A petition for writ of mandamus may be an appropriate means for seeking the review of an order granting disqualification or recusal of a district court judge

because effective review is not available after final judgment. *See* *Arizona v. United States Dist. Court (In re Cement Antitrust Litig.)*, 688 F.2d 1297, 1302-03 (9th Cir. 1982) (denying petition under supervisory mandamus authority).

However, an order denying disqualification or recusal of a district court judge generally will not warrant mandamus relief because it can be effectively reviewed after final judgment. *See* *id.* (dicta). *But see* *King v. United States Dist. Court*, 16 F.3d 992, 993 (9th Cir. 1994) (concluding mandamus relief was unavailable because denial of disqualification was not clearly erroneous, but noting in concurrence that petition for writ of mandamus may be appropriate means for seeking review of district court judge's refusal to recuse himself).

ii. Disqualification of Counsel

A petition for writ of mandamus may be an appropriate means for seeking review of an order denying a motion to disqualify opposing counsel. *See* *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1344 (9th Cir. 1981) (observing that review on appeal from final judgment may not be adequate to remedy any improper use of information by counsel during trial, but denying relief from order denying motion to disqualify opposing counsel due to conflict of interest); *see also* *Merle Norman Cosmetics, Inc. v. United States Dist. Court*, 856 F.2d 98, 100-02 (9th Cir. 1988) (denying petition for writ of mandamus from order denying motion to disqualify opposing counsel due to conflict of interest).

An order granting a motion to disqualify opposing counsel may warrant mandamus relief. *See* *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 378 n.13 (1981); *Cole v. United States Dist. Court*, 366 F.3d 813, 816-17 (9th Cir. 2004) (explaining that writ of mandamus may be used to review disqualification of counsel, and denying the petition); *Christensen v. United States Dist. Court*, 844 F.2d 694, 696-99 (9th Cir. 1988) (observing that inability to be represented during trial by chosen counsel cannot be effectively reviewed on appeal from final judgment, and granting petition for writ of mandamus from order disqualifying law firm from representing defendant in action brought by FSLIC, due to prior representation of client with adverse interests).

> *Cross-reference*: II.C.14 (regarding the appealability of orders disqualifying or declining to disqualify judge or counsel).

e. Jury Demand Orders

A petition for writ of mandamus is an available avenue for relief from an order denying trial by jury. *See* *Wilmington Trust v. United States Dist. Court*, 934 F.2d 1026, 1028 (9th Cir. 1991) (right to jury trial occupies "exceptional place" in history of federal mandamus, and showing of "clear and indisputable" right not required). "If the plaintiffs are entitled to a jury trial, their right to the writ is clear." *Tushner v. United States Dist. Court*, 829 F.2d 853, 855 (9th Cir. 1987) (citation omitted).

A writ of mandamus properly issues where the district court denies trial by jury due to an erroneous conclusion that petitioner has no right to trial by jury or that petitioner failed to timely demand a jury. *See* *Wilmington Trust*, 934 F.2d at 1028 (granting petition where district court erroneously concluded that petitioner had no right to trial by jury); *Tushner*, 829 F.2d at 855-56 (granting petition where district court erroneously concluded that jury demand in original federal action was untimely); *Mondor v. United States Dist. Court*, 910 F.2d 585, 587 (9th Cir. 1990) (granting petition where district court erroneously concluded that petitioner failed to properly demand jury after removal to federal court); *Myers v. United States Dist. Court*, 620 F.2d 741, 743-44 (9th Cir. 1980) (granting petition where district court erroneously concluded that petitioner failed to properly demand jury prior to removal to federal court).

f. Media Access Orders

A petition for writ of mandamus is an available avenue for relief from an order denying the media access to court proceedings or documents. *See* *Oregonian Publ'g Co. v. United States Dist. Court*, 920 F.2d 1462, 1464 (9th Cir. 1990) (observing that the media does not have standing to appeal because it is not a party to the proceeding, and absent mandamus relief, it faces serious injury to important First Amendment rights). *But see* *Copley Press, Inc. v. Higuera-Guerrero*, 518 F.3d 1022, 1025-26 (9th Cir. 2008) (determining that the court had jurisdiction pursuant to the collateral order doctrine to review an order unsealing documents).

In particular, a writ of mandamus may be appropriate to permit media access to documents filed in criminal proceedings. *See* *Oregonian Publ'g Co.*, 920 F.2d at 1467-68 (granting petition seeking access to documents relating to plea

agreement filed under seal); *Seattle Times Co. v. United States Dist. Court*, 845 F.2d 1513, 1519 (9th Cir. 1988) (granting petition seeking access to pretrial detention hearings and documents); *United States v. Schlette*, 842 F.2d 1574, 1576 (9th Cir.) (granting petition seeking access to presentence report, psychiatric report, and postsentence probation report), *amended by* 854 F.2d 359 (9th Cir. 1988); *Valley Broad. Co. v. United States Dist. Court*, 798 F.2d 1289, 1297 (9th Cir. 1986) (granting petition seeking access to certain exhibits received in evidence in criminal trial); *CBS, Inc. v. United States Dist. Court*, 765 F.2d 823, 826 (9th Cir. 1985) (granting petition seeking access to sealed post-conviction documents); *CBS, Inc. v. United States Dist. Court*, 729 F.2d 1174, 1184 (9th Cir. 1984) (granting petition seeking dissemination of government surveillance tapes created during criminal investigation).

g. Remand Orders

An order granting remand may warrant mandamus relief if appellate review is not barred by 28 U.S.C. § 1447(d), and the order is not appealable under the collateral order doctrine. *See Garamendi v. Allstate Ins. Co.*, 47 F.3d 350, 352-53 & n.7 (9th Cir. 1995).

i. Mandamus Relief Available

A writ of mandamus was deemed appropriate where the district court permitted removal and vacated its prior remand order upon defendant's second removal. *See Seedman v. United States Dist. Court*, 837 F.2d 413, 414 (9th Cir. 1988) (per curiam) (stating that "after certification to the state court a federal court cannot vacate a remand order issued under § 1447(c)," and ordering district court to remand action to state court).

ii. Mandamus Relief Not Available

An order remanding an action to state court under 28 U.S.C. § 1447(c), for lack of subject matter jurisdiction or defect in removal procedure, is not reviewable under § 1447(d), including by mandamus petition. *See Allegheny Corp. v. United States Dist. Court*, 881 F.2d 777, 777 (9th Cir. 1989). Moreover, an order remanding an action to state court based on a substantive determination apart from jurisdiction is reviewable as a collateral order, so mandamus relief is inappropriate.

See *Garamendi v. Allstate Ins. Co.*, 47 F.3d 350, 353-54 & n.7 (9th Cir. 1995); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-15 (1996); *Snodgrass v. Provident Life & Accident Ins. Co.*, 147 F.3d 1163, 1166 (9th Cir. 1998). Additionally, a district court's discretionary decision to decline supplemental jurisdiction is properly challenged pursuant to appeal, rather than in a petition for mandamus relief. *See* *California Dep't of Water Resources v. Powerex Corp.*, 533 F.3d 1087, 1092-93 (9th Cir. 2008).

Cross-reference: II.C.24 (regarding the appealability of the remand orders).

h. Transfer Orders

A petition for writ of mandamus is an available avenue for relief from an order transferring an action from one district court to another. *See* *Washington Pub. Util. Group v. United States Dist. Court*, 843 F.2d 319, 324-25 (9th Cir. 1988).

In the following instances, the court of appeals granted mandamus relief from an order of transfer:

- Order transferring action from one district court to another due to improper venue under 28 U.S.C. § 1406(a). *See* *Varsic v. United States Dist. Court*, 607 F.2d 245, 250-52 (9th Cir. 1979) (granting petition where in forma pauperis plaintiff seeking petition benefits would suffer "peculiar hardship" if forced to await final judgment to challenge transfer).

- Order transferring action from one district court to another for convenience of parties and witnesses under 28 U.S.C. § 1404(a). *See* *Sunshine Beauty Supplies, Inc. v. United States Dist. Court*, 872 F.2d 310, 311-12 (9th Cir. 1989) (granting petition where district court improperly failed to consider forum selection clause before ordering discretionary transfer orders), *abrogated on other grounds by* *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193 (2000). *But see* *Washington Pub. Util. Group v. United States Dist. Court*, 843 F.2d 319, 324-25 (9th Cir. 1988) (denying petition where petitioners

failed to show severe prejudice would result if transfer order not reviewed until after final judgment).

- Order transferring action from district court to Claims Court under 28 U.S.C. § 1631. *See Town of North Bonneville v. United States Dist. Court*, 732 F.2d 747, 750-52 (9th Cir. 1984) (granting petition where district court clearly erred in transferring actions to court that had no jurisdiction to entertain them).

Note that the court of appeals has jurisdiction to consider a petition for writ of mandamus challenging an order transferring an action to a district court in another circuit even after the action is docketed in the transferee court. *See NBS Imaging Syst., Inc. v. United States Dist. Court*, 841 F.2d 297, 298 (9th Cir. 1988) (denying mandamus relief where district court did not clearly err and petitioner delayed seeking relief).

Cross-reference: II.C.29 (regarding the appealability of transfer orders).

i. Other Orders

i. Mandamus Relief Available

A petition for writ of mandamus is an available avenue for relief from the following types of orders:

- Order of reference to special master. *See National Org. for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 546 (9th Cir. 1987) (denying petition where district court did not clearly err in assigning certain duties to special master and allocating costs to defendants).

- Order directing special master to inspect new prison pursuant to permanent injunction. *See Rowland v. United States Dist. Court*, 849 F.2d 380, 382 (9th Cir. 1988) (per curiam) (granting petition where district court acted outside its jurisdiction by ordering inspection of a prison not within the scope of the prior injunction).

- Order denying motion to dismiss counterclaims against qui tam plaintiffs. *See* *Mortgages, Inc. v. United States Dist. Court*, 934 F.2d 209, 211-12 (9th Cir. 1997) (per curiam) (granting petition where order clearly erroneous).

- Order holding amended habeas petition in abeyance pending exhaustion in state court of claims deleted from petition. *See* *Calderon v. United States Dist. Court*, 134 F.3d 981, 988 (9th Cir. 1998) (denying petition where order circumvented precedent but was not clearly erroneous under law as articulated), *abrogated as recognized by* *Joe v. Roe*, 425 F.3d 654 (9th Cir. 2005).

- Order to show cause directing parties to brief issue of district court's authority to reassign case. *See* *Brown v. Baden*, 815 F.2d 575, 576-77 (9th Cir. 1987) (per curiam) (granting petition because district court failed to comply with prior appellate order that case be reassigned upon remand).

- Order prohibiting attorneys in criminal proceeding from communicating with the media. *See* *Levine v. United States Dist. Court*, 764 F.2d 590, 601 (9th Cir. 1985) (granting petition directing district court to properly define scope of restraining order).

- Order staying civil rights action brought by pro se inmate. *See* *Reynaga v. Cammisa*, 971 F.2d 414, 418 (9th Cir. 1992) (granting petition where magistrate issued stay it had no authority to issue and petitioner likely powerless to prevent invalid stay order from being enforced).

- Order staying anti-trust action pending outcome of parallel state proceeding. *See* *Selma-Kingsburg-Fowler County Sanitation Dist. v. United States Dist. Court*, 604 F.2d 643, 644 (9th Cir. 1979) (granting petition because district court had no authority to stay federal action premised solely on federal law).

- Order requiring attorney to represent indigent litigants in civil action. *See* *Mallard v. United States Dist. Court*, 490 U.S. 296, 308-10 (1989) (holding that court of appeals should have granted petition because district court acted outside its jurisdiction under 28 U.S.C. § 1915(d) by coercively appointing counsel).

- Order directing attorneys to deposit money into discovery fund. *See* *Hartland v. Alaska Airlines*, 544 F.2d 992, 1001-02 (9th Cir. 1976) (granting petition where district court "had not even a semblance of jurisdiction original, ancillary or pendent to order anything or anybody" to pay money into a fund).

ii. Mandamus Relief Not Available

A petition for writ of mandamus is not an available avenue for relief from the following types of orders:

- Order denying motion to quash grand jury subpoena. *See* *Silva v. United States (In re Grand Jury Subpoena Issued to Bailin)*, 51 F.3d 203, 206-07 (9th Cir. 1995) (noting writ relief generally not available to avoid final judgment rule in the context of motions to quash grand jury subpoenas, and denying petition because district court ruling did not constitute usurpation of judicial power).

  Cross-reference: II.C.12.b.ii (regarding the appealability of orders denying motions to quash grand jury subpoenas).

- Order granting a new trial. *Allied Chem. Corp v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (observing that new trial order "rarely, if ever, will justify the issuance of a writ").

- Order denying motion to amend pleadings. *See* *Hartford Fire Ins. Co. v. Herrald*, 434 F.2d 638, 639 (9th Cir. 1970) (per curiam).

III. TIMELINESS

A. TIME PERIOD FOR APPEAL

1. TIMELY NOTICE REQUIRED FOR JURISDICTION

Failure to file a timely notice of appeal deprives the court of appeals of jurisdiction to review the judgment. *See* *Browder v. Director, Dep't of Corrs.*, 434 U.S. 257, 264 (1978) (stating that deadline to file notice of appeal is "mandatory and jurisdictional"); *Nguyen v. Southwest Leasing & Rental Inc.*, 282 F.3d 1061, 1064 (9th Cir. 2002); *Whittaker v. Whittaker Corp.*, 639 F.2d 516, 520 (9th Cir. 1981). If neither party objects to an untimely notice of appeal, the court of appeals must raise the issue sua sponte. *See* *Hostler v. Groves*, 912 F.2d 1158, 1160 (9th Cir. 1990).

2. DEADLINE FOR FILING NOTICE OF APPEAL

Ordinarily, a notice of appeal from a district court decision in a civil case "must be filed with the district clerk within 30 days after the judgment or order appealed from is entered." Fed. R. App. P. 4(a)(1)(A).

"When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered." Fed. R. App. P. 4(a)(1)(B).

"If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later." Fed. R. App. P. 4(a)(3).

3. WHETHER UNITED STATES IS A PARTY

a. Liberal Construction of Fed. R. App. P. 4(a)

Fed. R. App. P. 4(a) is to be read liberally to avoid uncertainty as to whether the 30-day or 60-day time period for appeal applies. *See* *Wallace v. Chappell*, 637 F.2d 1345, 1347 (9th Cir. 1981) (order) (en banc). The purpose of the lengthier

appeal time in cases in which a federal official or agency is a party is to permit time for routing the case to government officials responsible for deciding whether or not to appeal. *See id.*; *Hoag Ranches v. Stockton Prod. Credit Ass'n (In re Hoag Ranches)*, 846 F.2d 1225, 1227 (9th Cir. 1988) (order) (Rule 4 should be interpreted in light of its purpose).

b. Determining Party Status

i. Federal Official as Defendant

For Fed. R. App. P. 4(a) purposes, the United States is considered a party, and therefore the 60-day rule applies, where: (1) defendant officers were acting under color of office or color of law or lawful authority; or (2) any party is represented by a government attorney. *See Wallace v. Chappell*, 637 F.2d 1345, 1348 (9th Cir. 1981) (order) (en banc) (applying sixty-day period in race discrimination action against Navy personnel acting in their individual and official capacities).

ii. United States as Nominal Plaintiff

Actions that must be brought in the name of the United States are generally subject to the 60-day time period. *See United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100, 1102 (9th Cir. 1996) (holding United States is a party to a qui tam action brought under 31 U.S.C. § 3730(b)); *United States ex rel. Custom Fabricators, Inc. v. Dick Olson Constructors, Inc.*, 823 F.2d 370, 371 (9th Cir. 1987) (order) (per curiam) (holding United States is a party to an action brought under the Miller Act, 40 U.S.C. § 270a).

> *Cross-reference:* VI.C.1.b.ii (regarding when the United States is considered a party to a bankruptcy proceeding).

iii. United States Dismissed Prior to Appeal

"The United States need not be a party at the time an appeal is taken for the appeal to fit within the 60-day rule." *Diaz v. Trust Territory of the Pac. Islands*, 876 F.2d 1401, 1404 (9th Cir. 1989) (considering United States a party for

purposes of Fed. R. App. P. 4(a)(1) even though dismissed as a defendant prior to filing of appeal) (citation omitted).

iv. United States as Party in Bifurcated Proceedings

"[W]hen the United States is a named party, participates in the general action and is, or may be, interested in the outcome of an appeal, even though it is not a party to the appeal, then it is a 'party' for purposes of F.R.A.P. 4(a) and the 60-day time limit for appeal applies." *Kalinsky v. McDonnell Douglas (In re Paris Air Crash of March 3, 1974)*, 578 F.2d 264, 265 (9th Cir. 1978) (order) (citations omitted); *see also Lonberg v. Sanborn Theaters, Inc.*, 259 F.3d 1029, 1031 (9th Cir. 2001).

v. United States as Party to Consolidated Action

Where the United States is a party to one action, parties to consolidated actions are also entitled to the 60-day time limit. *See Burchinal v. Cent. Wash. Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484, 1487 (9th Cir. 1987) (finding notices of appeal timely under both Fed. R. App. P. 4(a)(1), (3)).

vi. Foreign Government Not Treated Like United States

An appeal by a foreign government is subject to the 30-day time limit. *See Dadesho v. Gov't of Iraq*, 139 F.3d 766, 767 (9th Cir. 1998) ("We find no basis for extending to foreign governments all the procedural protections our laws accord our own government.").

vii. United States Not a Party to Attorney Discipline Proceeding

The district court is not a party to an attorney discipline proceeding for purposes of Fed. R. App. P. 4(a), so the 30-day time limit applies. *See In re the Suspension of Pipkins*, 154 F.3d 1009, 1009 (9th Cir. 1998) (per curiam).

c. Defining Agency

i. Relevant Factors

In determining whether an entity is an agency for purposes of Fed. R. App. P. 4(a), the court of appeals considers the following factors:

- Extent to which entity performs governmental functions;
- Scope of government involvement in entity's management;
- Whether entity's operations are funded by the government;
- Extent to which persons other than the federal government have a proprietary interest in the agency;
- Whether entity is referred to as an agency in other federal statutes;
- Whether entity is treated as an arm of the federal government for other purposes, such as amenability to suit under the Federal Tort Claims Act.

See *Hoag Ranches v. Stockton Prod. Credit Ass'n (In re Hoag Ranches)*, 846 F.2d 1225, 1227-28 (9th Cir. 1988) (order).

ii. Factors Applied

The Trust Territory of the Pacific Islands is considered an agency of the United States for purposes of Fed. R. App. P. 4(a). *See* *Diaz v. Trust Territory of the Pac. Islands*, 876 F.2d 1401, 1404-05 (9th Cir. 1989).

However, the government of Guam is not an agency of the United States for purposes of Fed. R. App. P. 4(a). *See* *Blas v. Gov't of Guam*, 941 F.2d 778, 779 (9th Cir. 1991). Product Credit Agencies are also not agencies of the United States for purposes of Fed. R. App. P. 4(a). *See* *Hoag Ranches v. Stockton Prod. Credit Ass'n (In re Hoag Ranches)*, 846 F.2d 1225, 1228 (9th Cir. 1988) (order).

4. COMPUTATION OF TIME TO FILE NOTICE OF APPEAL

A notice of appeal must be "filed with the district clerk within [prescribed numbers of] days after the judgment or order appealed from is entered." Fed. R. App. P. 4(a)(1). The guidelines for computing notice of appeal deadlines are set forth in Fed. R. App. P. 26(a). *See* III.B (regarding when an order is deemed entered, thus triggering the time period of appeal).

a. Days Counted in Determining Deadline for Filing Notice of Appeal

In calculating the deadline for filing a notice of appeal, intermediate Saturdays, Sundays, and legal holidays are included. *See* Fed. R. App. P. 26(a) (stating that intermediate Saturdays, Sundays, and legal holidays are excluded if the time period is less than 11 days).

The following rules also apply: (1) the day of the event that begins the time to appeal is excluded; and (2) the last day of prescribed time period is included, unless it is a Saturday, Sunday, or legal holiday, or "if the act to be done is filing a paper in court" is a day on which the weather or other conditions make the clerk's office inaccessible. *See* Fed. R. App. P. 26(a); *Aldabe v. Aldabe*, 616 F.2d 1089, 1091 n.1 (9th Cir. 1980) (per curiam) ("When the 30th day falls on a weekend, the deadline for filing the notice of appeal is extended to the following Monday.").

Legal holidays include: New Year's Day, Martin Luther King, Jr.'s Birthday, President's Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, Christmas Day, and "any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office." *See* Fed. R. App. P. 26(a).

Where the 30th day after the district court's entry of judgment was a day on which the clerk's office was officially closed – the day after Thanksgiving – the time for filing a notice of appeal was extended pursuant to the Federal Rule of Appellate Procedure providing for such an extension when the last day of the 30-day deadline is a day on which "weather or other conditions make the clerk's office

inaccessible." Regardless of whether the day after Thanksgiving qualified as a legal holiday, it was a day on which the clerk's office was "inaccessible," despite the presence of an after-hours "drop box." *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 747 (9th Cir. 2001).

b. Date Notice of Appeal Deemed "Filed"

i. Generally

A notice of appeal is timely "filed" under Fed. R. App. P. 4(a) if it is received by the district court within the prescribed time. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1091 (9th Cir. 1980) (per curiam) ("[A]n appellant has no control over delays between receipt and filing."); *see also Lundy v. Union Carbide Corp.*, 695 F.2d 394, 395 n.1 (9th Cir. 1982) (arrival of notice of appeal at former address for district court clerk within prescribed time constituted "constructive receipt" and was deemed sufficient to confer appellate jurisdiction).

> *Cross-reference*: IV (regarding the form and content of a notice of appeal).

A notice of appeal mistakenly submitted to the court of appeals is to be transferred to the district court clerk with a notation of the date of receipt, and "[t]he notice is then considered filed in the district court on the date so noted." Fed. R. App. P. 4(d); *see also Portland Fed. Employees Credit Union v. Cumis Ins. Soc'y, Inc.*, 894 F.2d 1101, 1103 (9th Cir. 1990) (per curiam); *Decker v. Advantage Fund, Ltd.*, 362 F.3d 593, 595 (9th Cir. 2004) (exercising jurisdiction when the notice of appeal was mistakenly filed in the bankruptcy court, where it would have been timely had it been filed in the district court).

A petition for review of a Board of Immigration Appeals decision was timely "received" by the clerk on the day the postal employee put notification slips in the clerk's Post Office box stating that the petition, which had been sent by overnight express mail, was available for pickup, not on the following day when the petition was brought to the clerk's office and stamped by the clerk, because the local rule provided that all mail was to be sent to the court's Post Office box, not to the street address. *Sheviakov v. INS*, 237 F.3d 1144, 1148 (9th Cir. 2001).

ii. Pro Se Prisoners

A notice of appeal by a pro se prisoner is deemed timely filed "if it is deposited in the institution's internal mail system on or before the last day for filing." Fed. R. App. P. 4(c)(1); *see also* *Paul Revere Ins. Group v. United States*, 500 F.3d 957, 960 n.3 (9th Cir. 2007); *Koch v. Ricketts*, 68 F.3d 1191, 1193 (9th Cir. 1995) (Fed. R. App. P. 4(c) codifies *Houston v. Lack*, 487 U.S. 266 (1988)). "If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule." Fed. R. App. P. 4(c).

A notarized statement or declaration setting forth the date of deposit and stating that first-class postage has been prepaid may constitute proof of timely filing. *See* Fed. R. App. P. 4(c)(1). The opposing party then has the burden of "producing evidence in support of a contrary factual finding." *Caldwell v. Amend*, 30 F.3d 1199, 1203 (9th Cir. 1994); *see also* *Koch*, 68 F.3d at 1194.

Where the initial notice of appeal is deposited in a prison's mail system, the 14-day time period for another party to file a notice of appeal "runs from the date when the district court dockets the first notice." Fed. R. App. P. 4(c).

5. APPLICABILITY OF FED. R. APP. P. 4(a) TIME LIMITS

The time limits set forth in Fed. R. App. P. 4(a) apply to civil appeals. Types of orders that are, and are not, deemed civil for purposes of calculating the time period for appeal are enumerated below.

a. Fed. R. App. P. 4(a) Time Limits Applicable

Fed. R. App. P. 4(a) time limits apply to the following appeals:

- Appeal from order on application for writ of habeas corpus. *See* *Yasui v. United States*, 772 F.2d 1496, 1499 (9th Cir. 1985), *superseded by rule on other grounds as stated in* *United States v. Kwan*, 407 F.3d 1005, 1011 n.2 (9th Cir. 2005); *Williams v. Borg*, 139 F.3d 737, 739 (9th Cir. 1998).

- Appeal from order granting or denying a petition for writ of error coram nobis. Fed. R. App. P. 4(a)(1)(c); *United States v. Kwan*, 407 F.3d 1005, 1011 (9th Cir. 2005).

- Appeal from order concerning grand jury subpoena. *See Manges v. United States (In re Grand Jury Proceedings)*, 745 F.2d 1250, 1251 (9th Cir. 1984).

- Appeal from order issued in a criminal proceedings prohibiting INS from deporting defendant. *See United States v. Yacoubian*, 24 F.3d 1, 4-5 (9th Cir. 1994) (a civil order that does not constitute a "step in the criminal case" is governed by the civil time limits even though issued in a criminal proceeding).

- Appeal from order issued in criminal proceeding enjoining government from filing forfeiture action against acquitted defendant. *See United States v. Kismetoglu*, 476 F.2d 269, 270 n.1 (9th Cir. 1973) (per curiam).

- Appeal from order forfeiting bail bond. *See United States v. Vaccaro*, 51 F.3d 189, 191 (9th Cir. 1995) (concluding that enforcement of bond forfeiture is a civil action even though it arises from a prior criminal proceeding).

- Appeal from order denying third party petition to amend criminal forfeiture order. *See United States v. Alcaraz-Garcia*, 79 F.3d 769, 772 n.4 (9th Cir. 1996).

- Appeals from orders in bankruptcy actions. *See Bennett v. Gemmill (In re Combined Metals Reduction Co.)*, 557 F.2d 179, 203 (9th Cir. 1977); *see also* VI.C (Bankruptcy Appeals).

b. Fed. R. App. P. 4(a) Time Limits Not Applicable

Fed. R. App. P. 4(a) time limits do not apply to the following appeals:

- Permissive Appeals under 28 U.S.C. § 1292(b). *See* Fed. R. App. P. 5; *see also* II.B.4 (Permissive Appeals).

- Criminal Appeals. Appeals from orders constituting a "step in the criminal case" are governed by Fed. R. App. P. 4(b) unless the proceeding arises from a statute providing its own procedures and time limits. *See United States v. Ono*, 72 F.3d 101, 102-03 (9th Cir. 1995) (order); *see also* VIII.F (Criminal Appeals).

- Tax Court and Agency Appeals. *See* VII (Agency and Tax Court Appeals).

- Petition for Writ of Mandamus. *See* II.D (Petition for Writ of Mandamus).

- Bail Decisions in Extradition Cases. *See United States v. Kirby (In re Requested Extradition of Kirby)*, 106 F.3d 855, 857 n.1 (9th Cir. 1996).

6. CROSS-APPEALS

"If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later." Fed. R. App. P. 4(a)(3).

Where the initial notice of appeal is deposited in a prison mail system by a pro se prisoner, the 14-day time period "runs from the date when the district court dockets the first notice." Fed. R. App. P. 4(c)(2).

If the notice of appeal is untimely, then any subsequent notice of cross-appeal is also untimely even if filed within 14 days of the initial notice. *See Meza*

v. Washington State Dep't of Soc. & Health Servs., 683 F.2d 314, 316 (9th Cir. 1982).

B. ENTRY OF JUDGMENT

1. GENERALLY

The time period for appeal as of right in a civil action begins to run on the date "the judgment or order appealed from is entered." Fed. R. App. P. 4(a)(1) (as amended Dec. 1, 2002); Fed. R. Civ. P. 54(a) ("judgment" includes any appealable order).

> [J]udgment is entered at the following times: (1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or (2) if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs: (A) it is set out in a separate document; or (B) 150 days have run from the entry in the civil docket.

Fed. R. Civ. P. 58(c).

However, an order may be appealable as soon as it is final even though the time period for filing a notice of appeal does not begin to run until judgment is entered. *See* *McCalden v. Cal. Library Ass'n*, 955 F.2d 1214, 1218 (9th Cir. 1990); *see also* *Bonham v. Compton (In re Bonham)*, 229 F.3d 750, 760 n.3 (9th Cir. 2000).

2. 150-Day Rule

Fed. R. Civ. P. 58 was amended in 2002, adding a 150-day limit to the time a judgment can go unentered. "Thus, even if the district court does not set forth the judgment on a separate document, an appealable final order is considered entered when 150 days have run from the time the final order is docketed." *Stephanie-Cardona LLC v. Smiths' Food and Drug Ctrs.*, 476 F.3d 701, 703 (9th Cir. 2007).

a. Application of the 150-Day Rule

The 150-day rule has been in applied in the following cases:

- Where the district court failed to set forth judgment on a separate document after an order dismissing all claims had been entered, the court held that the notice of appeal was timely because it was filed before 150 days had run. *See* *Peng v. Mei Chin Penghu*, 335 F.3d 970, 975 (9th Cir. 2003).

- Where the district court granted summary judgment by a minute order, but did not set forth the judgment on a separate document, the court held the notice of appeal filed before the end of the 150-day period was timely. *See* *Ford v. MCI Communications Corp. Health & Welfare Plan*, 399 F.3d 1076, 1080 (9th Cir. 2005).

- Where the appealed judgment was not set forth on a separate document, the appeal was timely where it was filed within 180 days after entry of the judgment – 150 days for entry of the judgment, plus 30 days for filing the notice of appeal. *See* *ABF Capital Corp. v. Osley*, 414 F.3d 1061, 1064-65 (9th Cir. 2005).

- Where the notice of appeal was not filed within 180 days of the district court's stipulation and order disposing of all claims in the lawsuit, the court lacked jurisdiction over the appeal. *See* *Stephanie-Cardona LLC v. Smiths' Food and Drug Ctrs.*, 476 F.3d 701, 704-05 (9th Cir. 2007).

- Where judgment was not entered on separate document, the 30-day period for filing of notice of appeal began to run 150 days after entry of order in civil docket dismissing case for lack of personal jurisdiction, and thus notice of appeal filed 176 days after entry of order was timely. *See* *Menken v. Emm*, 503 F.3d 1050, 1056 (9th Cir. 2007).

3. SEPARATE DOCUMENT REQUIREMENT

> Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion: (1) for judgment under Rule 50(b); (2) to amend or make additional findings under Rule 52(b); (3) for attorney's fees under Rule 54; (4) for a new trial, or to alter or amend the judgment, under Rule 59; or (5) for relief under Rule 60.

Fed. R. Civ. P. 58(a).

"The sole purpose of the separate-document requirement . . . [is] to clarify when the time for appeal . . . begins to run." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384 (1978) (per curiam), *superceded by rule as stated in Outlaw v. Airtech Air Conditioning & Heating, Inc.*, 412 F.3d 156 (D.C. Cir. 2005); *see also Whitaker v. Garcetti*, 486 F.3d 572, 579 (9th Cir. 2007); *Ford v. MCI Communications Corp. Health & Welfare Plan*, 399 F.3d 1076, 1079 (9th Cir. 2005).

a. Document Distinct from Memorandum

"A sheet containing the judgment, usually prepared by the clerk, must be distinct from any opinion or memorandum." *Vernon v. Heckler*, 811 F.2d 1274, 1276 (9th Cir. 1987) (internal quotation and citations omitted). The separate document rule is to be "mechanically applied" and all formalities observed. *See McCalden v. Cal. Library Ass'n*, 955 F.2d 1214, 1218 (9th Cir. 1990) (citations omitted).

Note the authorities discussed below predate the 150-day rule set forth in Fed. R. Civ. P. 58(c).

i. Fed. R. Civ. P. 58 Requirements Not Satisfied

Without more, the following documents do not satisfy the requirements of Fed. R. Civ. P. 58:

- Order containing the grounds for decision, entered in the docket and mailed to the parties. *See* *Vernon v. Heckler*, 811 F.2d 1274, 1276 (9th Cir. 1987) (involving four-page order outlining facts, law, and legal analysis); *see also* *Corrigan v. Bargala*, 140 F.3d 815, 817-18 (9th Cir. 1998) (involving two-page order setting forth basis for dismissal); *Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1458 (9th Cir. 1989) (citation omitted) (involving nine-page memorandum that denied motion in last sentence); *Mitchell v. Idaho*, 814 F.2d 1404, 1405-06 (9th Cir. 1987) (per curiam) (involving eight-page document that "discussed the facts and law and detailed the reasons for the district court's decision").

- Order granting summary judgment stamped "entered." *See* *United States v. Carter*, 906 F.2d 1375, 1376 (9th Cir. 1990).

- Document entitled "Findings of Fact and Conclusions of Law," stating that "judgment shall be entered in favor of Defendants and against Plaintiffs." *Ferguson v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 854 F.2d 1169, 1173 & n.3 (9th Cir. 1988).

- Order refusing to enter judgment on the mistaken premise that judgment had already been entered. *McCalden v. Cal. Library Ass'n*, 955 F.2d 1214, 1218-19 (9th Cir. 1990) ("Since the very purpose of Rule 4(a) is to avoid confusion, we cannot hold, Magritte-like, that an order stating that 'this is not an entry of judgment' is nonetheless an entry of judgment.").

- Order which "consists only of a district court's adoption of a magistrate's recommendation." *Yang v. Shalala*, 22 F.3d 213, 216 (9th Cir. 1994).

ii. Fed. R. Civ. P. 58 Requirements Satisfied

The requirements of Fed. R. Civ. P. 58 were satisfied in the following instances:

- Following a seven-page document outlining facts, law, and analysis, the district court entered a five-line "Supplemental Judgment" that "no more than reaffirm[ed]" the previous order. *Paddack v. Morris*, 783 F.2d 844, 846 (9th Cir. 1986).

- Following entry of a minute order, the district court entered an amended judgment granting pre-judgment interest pursuant to a Fed. R. Civ. P. 59 motion. *See Pac. Employers Ins. Co. v. Domino's Pizza, Inc.*, 144 F.3d 1270, 1277-78 (9th Cir. 1998) (pointing out that amended judgment referred to district court proceedings and ruling on Rule 59 motion, but contained no facts, law, or analysis).

- Following an "order and judgment" that contained facts and legal analysis, an amendment in the form of a separate judgment that corrected a few typographical errors was entered. The court of appeals found that the subsequent amendment satisfied the separate judgment requirements of Fed. R. Civ. P. 58. *See Long v. Coast Resorts, Inc.*, 267 F.3d 918, 922 (9th Cir. 2001).

b. Lack of Opinion or Memorandum

"Rule 58 does not require district courts to enter detailed orders addressing the merits of the case prior to entering the final judgment." *Pac. Employers Ins. Co. v. Domino's Pizza, Inc.*, 144 F.3d 1270, 1278 (9th Cir. 1998). "In fact, under Rule 58, a district court is not even required to file two separate documents." *Id.* (citation omitted).

Thus, Fed. R. Civ. P. 58 may be satisfied by entry of a single document in the form of a brief order that clearly indicates the decision is final. *See United States v. Schimmels (In re Schimmels)*, 85 F.3d 416, 421-22 (9th Cir. 1996) (single sentence reciting history of case did not preclude order satisfying separate document rule upon entry).

c. Minute Orders

A minute order may satisfy Fed. R. Civ. P. 58 where it states on its face that it is an order, and it is mailed to counsel, signed by the clerk, and entered on the

docket sheet. *See* *Beaudry Motor Co. v. Abko Props., Inc.*, 780 F.2d 751, 754-56 (9th Cir. 1986) (minute order constituted separate judgment); *see also* *Brown v. Wilshire Credit Corp. (In re Brown)*, 484 F.3d 1116, 1122 (9th Cir. 2007) (reaffirming "rule that a minute entry ordering the denial of a motion for new trial, after a final judgment has *already* been entered starts the appeal clock); *cf.* *Carter v. Beverly Hills Sav. & Loan Ass'n*, 884 F.2d 1186, 1190 (9th Cir. 1989) (concluding minute order did not constitute separate judgment because it was not signed by the deputy clerk who prepared it, it did not contain language stating "IT IS ORDERED," and it merely represented what occurred at pretrial conference); *but see* *Radio Television Espanola S.A. v. New World Entm't, Ltd.*, 183 F.3d 922, 931-32 (9th Cir. 1999) (even though minute order contained the language "IT IS SO ORDERED," the order did not satisfy the local rules to constitute an entry of judgment, and thus the court of appeals did not decide whether it satisfied Fed. R. Civ. P. 58).

This court has held that where a minute order merely memorialized the bankruptcy court's ruling on pre-judgment motions it was not a judgment, and thus did not trigger the appeal window. *See* *Brown*, 484 F.3d at 1122.

d. Lack of Separate Judgment Does Not Render Appeal Premature

The lack of a separate document does not preclude appellate jurisdiction. *See* *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 386 (1978); *United States v. Nordbrock*, 38 F.3d 440, 442 n.1 (9th Cir. 1994); *Sutton v. Earles*, 26 F.3d 903, 906 n.1 (9th Cir. 1994); *Kirkland v. Legion Ins. Co.*, 343 F.3d 1135, 1140 (9th Cir. 2003) (explaining that final judgment to comply with separate judgment requirement does not preclude appellate jurisdiction). Where appeal is taken from a final, entered order, and appellee does not object to lack of a separate judgment, the separate document rule is deemed waived. *See* *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 386 (1978) (per curiam); *Spurlock v. FBI*, 69 F.3d 1010, 1015 (9th Cir. 1995) ("[I]f no question exists as to the finality of the district court's decision, the absence of a Rule 58 judgment will not prohibit appellate review." (citation omitted)). Waiver of the separate judgment requirement has been found where the district court granted summary judgment and concluded "IT IS SO ORDERED" and the plaintiff subsequently moved for relief from judgment. *See* *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1259 (9th Cir. 2004); *see also* *Whitaker v.*

Garcetti, 486 F.3d 572, 580 (9th Cir. 2007) (where the parties treated a fully dispositive summary judgment order as if it were a final judgment, the separate document requirement was waived); *Long v. County of Los Angeles*, 442 F.3d 1178, 1184 n.3 (9th Cir. 2006).

i. Waiver of Separate Document Requirement by Appellee

An appellee's failure to timely object to the lack of a separate document constitutes waiver of the separate document requirement. *See Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1441 (9th Cir. 1991); *see also Vernon v. Heckler*, 811 F.2d 1274, 1276-77 (9th Cir. 1987) (deeming requirement waived where appellee objected to timeliness of appeal but not to lack of separate judgment).

ii. Waiver of Separate Document Requirement by Appellant

The separate document rule should be construed "to prevent loss of the right of appeal, not to facilitate loss." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 386 (1978) (per curiam) (citation omitted). Therefore, an appellant's failure to invoke the separate document requirement generally will not be construed as waiver if to do so would defeat appellate jurisdiction. *See Corrigan v. Bargala*, 140 F.3d 815, 818 (9th Cir. 1998) (concluding that pro se appellant's motion to extend time to file appeal, premised on mistaken belief that deadline for appeal had already passed, did not constitute waiver of separate document requirement, reversing order denying extension of time to appeal, and remanding case for entry of judgment).

However, an appellant may waive the separate document requirement by entering into a stipulation that no formal order need be entered. *See Taylor Rental Corp. v. Oakley*, 764 F.2d 720, 721-22 (9th Cir. 1985) (dismissing appeal as untimely where, although order denying post-judgment motions was never properly entered, appellants had previously stipulated that it need not be). Additionally, the appellant may waive the separate document requirement where the district court granted summary judgment and concluded "it is so ordered" and the appellant subsequently moved for relief from judgment, thereby indicating the

belief that judgment had been entered. *See* *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1259 (9th Cir. 2004), *cert. denied by* 543 U.S. 870 (2004).

iii. Objection by Appellee to Lack of Separate Judgment

Because the sole purpose of the separate document requirement is to clarify when the time period for appeal begins to run, an appellee's objection to a district court's failure to enter a separate judgment does not preclude appellate jurisdiction absent a showing of prejudice. *See* *Harris v. McCarthy*, 790 F.2d 753, 756-57 & n.1 (9th Cir. 1986) (concluding that notice of appeal filed within prescribed time period conferred appellate jurisdiction despite appellee's objection to lack of a separate judgment because appellee could show no prejudice and "nothing but delay would flow" from remand to require entry of judgment). However, "[i]f a separate judgment is not entered by the district court and, as a result, the appellant is able to file an appeal after the prescribed period, the appellee would have suffered prejudice." *Id.* at 756 n.1.

4. MANNER OF ENTERING JUDGMENT

All orders, verdicts, and judgments must be entered chronologically in the docket. Fed. R. Civ. P. 79(a). "Each entry must briefly show . . . the substance and date of entry of each order and judgment." *Id.*; *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384 n.4 (1978) (per curiam) (dicta discussing requirement and rationale of entry under Fed. R. Civ. P. 79(a)).

The clerk's substantial compliance with Fed. R. Civ. P. 79(a) requirements may be sufficient to render judgment "entered." *See, e.g.*, *Rodgers v. Watt*, 722 F.2d 456, 461 (9th Cir. 1983) (judgment satisfactorily entered even though last docket entry indicated motion still under advisement because penultimate entry, bearing higher bracketed number, indicated motion had been decided and "strict chronology [is] almost impossible").

However, where the date of entry of judgment is ambiguous, the court of appeals may construe the ambiguity in favor of appellant. *See, e.g.*, *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 502 (9th Cir. 1986) ("it would be harsh, overtechnical, and contrary to substantive justice" to hold appellant to original

entry date where clerk whited it out and inserted new date after correcting clerical error in the judgment); *see also* *United States v. Depew*, 210 F.3d 1061, 1065 (9th Cir. 2000) (construing ambiguity in favor of saving appeal when the entry date of judgment was unclear because docket entry had one date, but entry was followed by notation of a second later date).

5. JUDGMENT SIGNED BY CLERK

Before a judgment is entered under Fed. R. Civ. P. 58, it is to be signed by the clerk. *See* Fed. R. Civ. P. 58; *Carter v. Beverly Hills Sav. & Loan Ass'n*, 884 F.2d 1186, 1189 (9th Cir. 1989) (holding entry of civil minutes in docket did not satisfy Fed. R. Civ. P. 58 where, among other things, minutes not signed by deputy clerk who was present during proceedings and who prepared the order).

6. NOTICE OF ENTRY OF JUDGMENT

"Lack of notice of the entry [of judgment] does not affect the time for appeal or relieve – or authorize the court to relieve – a party for failing to appeal within the time allowed . . . ." Fed. R. Civ. P. 77(d)(2); *Molloy v. Wilson*, 878 F.2d 313, 315 n.3 (9th Cir. 1989). Although notice of entry of judgment required under Fed. R. App. P. 4(a)(6) is not confined to written communication alone, the quality of the communication must rise to the functional equivalent of written notice to satisfy the Rule's notice requirement, meaning it must be specific, reliable, and unequivocal. *See* *Nguyen v. S.W. Leasing & Rental Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002).

However, lack of notice may be a factor in determining whether to extend the time for appeal under Fed. R. App. P. 4(a)(6). *See* III.D.3 (regarding extension of time to appeal under Fed. R. App. P. 4(a)(6)).

C. PREMATURE NOTICE OF APPEAL

1. GENERALLY

"A notice of appeal filed after the court announces a decision or order – but before the entry of the judgment or order – is treated as filed on the date of and

after the entry." Fed. R. App. P. 4(a)(2); *See* *Ford v. MCI Communications Corp. Health & Welfare Plan*, 399 F.3d 1076, 1081 (9th Cir. 2005).

Fed. R. App. P. 4(a)(2) applies only when a district court announces "a decision that would be appealable if immediately followed by the entry of judgment." *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 276 (1991). The premature notice may be deemed effective if appellant reasonably but mistakenly believed the earlier decision was the final judgment and appellee would not be prejudiced. *See* *id.* at 276-77 (purpose of Fed. R. App. P. 4(a)(2) is "to protect the unskilled litigant" whose actions are reasonable but mistaken).

2. NOTICE FILED BEFORE ENTRY OF JUDGMENT

A premature notice of appeal may be effective to appeal from a subsequently entered final judgment if, at the time the notice was filed, all that remained for the district court to do was the ministerial act of entering judgment. *See* Fed. R. App. P. 4(a)(2); *Kendall v. Homestead Dev. Co. (In re Jack Raley Constr., Inc.)*, 17 F.3d 291, 294 (9th Cir. 1994); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1482-83 (9th Cir. 1996).

Cross-reference: III.B (regarding what constitutes entry of judgment).

a. Premature Notice Effective

A premature notice of appeal was deemed effective under Fed. R. App. P. 4(a)(2) in the following instances:

- Notice of appeal filed after district court orally granted summary judgment as to all claims and all that remained for court to do was enter final judgment along with findings of fact and conclusions of law. *See* *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 276-77 (1991).

- Notice of appeal filed after magistrate judge ordered entry of judgment, but before judgment in fact entered. *See* *Price v. Seydel*,

961 F.2d 1470, 1473 (9th Cir. 1992) (concluding that notice of appeal was only "technically premature").

- Notice of appeal filed after district court entered "Memorandum and Order" dismissing action but before judgment entered. *See* *Attwood v. Mendocino Coast Dist. Hosp.*, 886 F.2d 241, 242 (9th Cir. 1989).

- Notice of appeal filed after announcement of verdict but before entry of judgment on verdict. *See* *United States v. 30.64 Acres of Land*, 795 F.2d 796, 798 (9th Cir. 1986).

- Notice of appeal filed after district court granted summary judgment and dismissed remaining supplemental claims, but before entry of judgment. *See* *Long v. Country of Los Angeles*, 442 F.3d 1178, 1183 n.3 (9th Cir. 2006).

b. Premature Notice Not Effective

Where more than a ministerial act remains after a decision, a notice of appeal from the decision is ordinarily not effective to appeal a subsequently entered judgment. *See* *Kendall v. Homestead Dev. Co. (In re Jack Raley Constr., Inc.)*, 17 F.3d 291, 294 (9th Cir. 1994) (considering reasonableness of appellant's belief that notice of appeal was effective).

A premature notice of appeal was deemed ineffective under Fed. R. App. P. 4(a)(2) in the following instances:

- Matter of pre-judgment interest not decided until after notice filed. *See* *Kendall v. Homestead Dev. Co. (In re Jack Raley Constr., Inc.)*, 17 F.3d 291, 294 (9th Cir. 1994) (concluding appellants had no reasonable belief that notice of appeal was effective especially where they requested permission to brief and argue remaining issue).

- Amount of costs and fees award not decided until after notice filed. *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1482-83 (9th Cir. 1996) (concluding appellants had no reasonable belief that notice of appeal

was effective especially where court requested further submissions as to remaining issue).

- Notice of appeal from magistrate judge's report and recommendation ineffective because judgment not entered by district court until after notice filed. *See* *Serine v. Peterson*, 989 F.2d 371, 372-73 (9th Cir. 1993) (order) (concluding appellant had no reasonable belief that notice of appeal was effective where appellant filed objection to report and recommendation in district court).

- Notice of appeal from "a clearly interlocutory decision" not effective to appeal final judgment. *See* *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 276 (1991) ("A belief that such a decision is a final judgment would not be reasonable.").

3. REMAINING CLAIMS FINALIZED AFTER NOTICE OF APPEAL

A notice of appeal from an order that disposes of fewer than all claims against all parties, and is not certified under Fed. R. Civ. P. 54(b), may be rendered effective by subsequent events such as finalization of the remaining claims. *See* *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 680 (9th Cir. 1980). Note that a premature notice of appeal cannot be cured where the dispositive final order is not an appealable final judgment or other appealable order. *See* *Special Invs., Inc. v. Aero Air, Inc.*, 360 F.3d 989, 993 (9th Cir. 2004).

However, a premature notice of appeal cannot be cured by subsequent events once the court of appeals dismisses the premature appeal for lack of jurisdiction. *See* *Noa v. Key Futures, Inc.*, 638 F.2d 77, 78 (9th Cir. 1980) (per curiam).

a. Compare Rule 54(b) Certification

A notice of appeal from an order disposing of fewer than all claims against all parties may be cured by the district court's subsequent certification of the order under Fed. R. Civ. P. 54(b), as long as neither party is prejudiced. *See* *Freeman v. Hittle*, 747 F.2d 1299, 1302 (9th Cir. 1984). *See* II.A.3 (regarding the requirements for certification under Fed. R. Civ. P. 54(b)).

b. Premature Notice of Appeal Cured

A premature notice of appeal has been cured where:

- District court subsequently dismissed federal claim as to remaining defendants and remanded state claims to state court. *See* *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 680 (9th Cir. 1980).

- District court subsequently dismissed remaining pendent state claims. *See* *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 584 (9th Cir. 1993).

- District court subsequently dismissed counterclaim. *See* *Ethridge v. Harbor House Rest.*, 861 F.2d 1389, 1402 (9th Cir. 1988).

- Appellant subsequently dismissed claims against remaining defendant. *See* *Fidelity & Deposit Co. v. City of Adelanto*, 87 F.3d 334, 336 (9th Cir. 1996).

- Remaining consolidated action was subsequently settled and dismissed. *See* *Fadem v. United States*, 42 F.3d 533, 534-35 (9th Cir. 1994) (order).

c. Premature Notice of Appeal Not Cured

A premature notice of appeal is not cured where the remaining claim is voluntarily dismissed without prejudice. *See* *Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073, 1076-78 (9th Cir. 1994) (reasoning that remaining claim not "finalized" because it could be resurrected under the terms of the stipulation, thereby defeating the policy against piecemeal review); *see also* II.C.13.b.v.

D. EXTENSION OF TIME TO APPEAL

1. GENERALLY

a. Extension of Time to Appeal by Court of Appeals

Under the Federal Rules of Appellate Procedure, the court of appeals "may not extend the time to file . . . a notice of appeal (except as authorized in Rule 4)." Fed. R. App. P. 26(b).

Cross-reference: III.F.2 (regarding the effect of a timely post-judgment tolling motion on the time period for appeal); III.E (regarding the circumstances under which the court of appeals may hear a late-filed appeal).

b. Extension of Time to Appeal by District Court

The district court has limited authority under Fed. R. App. P. 4(a)(5) and (a)(6), and Fed. R. Civ. P. 60(b) to extend the time for filing an appeal. The following three sections discuss those provisions in turn.

2. EXTENSION OF TIME TO APPEAL UNDER FED. R. APP. P. 4(a)(5)

"The district court may extend the time to file a notice of appeal if: (i) a party so moves no later than 30 days after the time [for appeal] expires; and (ii) . . . that party shows excusable neglect or good cause." Fed. R. App. P. 4(a)(5)(A).

a. Timeliness of Motion for Extension

"The requirement that motions for extension be filed within thirty days of the original deadline is mandatory and jurisdictional." *Alaska Limestone Corp. v. Hodel*, 799 F.2d 1409, 1411 (9th Cir. 1986) (per curiam) (citations omitted); *see also Vahan v. Shalala*, 30 F.3d 102, 103 (9th Cir. 1994) (per curiam) (holding district court has no authority to extend time for appeal if motion for extension not timely filed).

b. Form of Motion for Extension

i. Formal Motion Required

A "formal motion" is required under Fed. R. App. P. 4(a)(5). *See Malone v. Avenenti*, 850 F.2d 569, 572-73 (9th Cir. 1988) (holding that pro se letter that did not explicitly request extension, and did not give proper notice to other parties, did not constitute motion for extension of time to appeal under Fed. R. App. P. 4(a)(5)); *Cel-A-Pak v. Cal. Agric. Labor Relations Bd.*, 680 F.2d 664, 666 (9th Cir. 1982) (per curiam) (declining to construe district court's mere acceptance of

untimely notice of appeal as grant of extension where appellant did not move for extension).

ii. When Notice Required

A motion for extension under Fed. R. App. P. 4(a)(5) filed before expiration of the time to appeal "may be ex parte unless the court requires otherwise." Fed. R. App. P. 4(a)(5)(B). If a motion for extension is filed after expiration of the time period for appeal, "notice must be given to the other parties in accordance with local rules." Fed. R. App. P 4(a)(5)(B); *Malone v. Avenenti*, 850 F.2d 569, 572 (9th Cir. 1988).

c. Standard for Granting Motion for Extension

A motion for extension filed before expiration of the original time for appeal must show "good cause," whereas a motion for extension filed after expiration of the original time for appeal must show "excusable neglect." *Oregon v. Champion Int'l Corp.*, 680 F.2d 1300, 1301 (9th Cir. 1982) (per curiam).

The court of appeals reviews for abuse of discretion a district court's extension order granting a party an extension of time in which to file a notice of appeal. *See Marx v. Loral Corp.*, 87 F.3d 1049, 1053 (9th Cir. 1996); *see also Pincay v. Andrews*, 398 F.3d 853, 858 (9th Cir. 2004).

i. Good Cause

The less stringent "good cause" standard was added to Fed. R. App. P. 4(a)(5) because the excusable neglect standard "never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time." *Oregon v. Champion Int'l Corp.*, 680 F.2d 1300, 1301 (9th Cir. 1982) (per curiam) (citing Advisory Committee Notes to 1979 amendment to Fed. R. App. P. 4(a)(5); 9 Moore's Federal Practice ¶ 204.13 (2nd ed. 1980)).

ii. Excusable Neglect

The Ninth Circuit has applied to Fed. R. App. P. 4(a)(5) the "excusable neglect" standard established by the Supreme Court in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993) (bankruptcy case). *See Marx v. Loral Corp.*, 87 F.3d 1049, 1053-54 (9th Cir. 1996); *see also Stutson v. United States*, 516 U.S. 193, 195 (1996) (per curiam).

Under the *Pioneer* standard, "neglect" includes acts of mere negligence. *See Marx*, 87 F.3d at 1054. Whether neglect is "excusable" is an equitable determination that must take into account all relevant circumstances, including: (1) danger of prejudice to nonmovant; (2) length of delay and its potential impact on proceedings; (3) reason for delay and whether it was in movant's control; and (4) whether movant acted in good faith. *See id.* (district court did not abuse its discretion in finding excusable neglect where counsel miscalendared deadline for appeal and had difficulty scheduling a meeting with all members of plaintiff class); *see also Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997) (per curiam).

"[I]nadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." *Pioneer*, 507 U.S. at 392. This aspect of the *Pioneer* standard has been applied in analogous contexts. *See Comm. for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 825 (9th Cir. 1996) (holding that ignorance of amendments to federal and local rules does not constitute excusable neglect under Fed. R. Civ. P. 6(b)); *Kyle v. Campbell Soup Co.*, 28 F.3d 928, 931-32 & n.4 (9th Cir. 1994) (holding that misconstruction of a nonambiguous rule does not constitute excusable neglect under Fed. R. Civ. P. 6(b)). Note there is no per se rule making a mistake of law inexcusable. *See Pincay v. Andrews*, 389 F.3d 853, 860 (9th Cir. 2004) (en banc). Rather, whether an extension of time to file notice of appeal should be granted is entrusted to the discretion of the district court. *See id.*

"[T]he fact that counsel was experiencing upheaval in his law practice at the time of the bar date," is also accorded little weight. *Pioneer*, 507 U.S. at 397; *see also United States ex rel. Familian Nw., Inc. v. RG & B Contractors, Inc.*, 21 F.3d 952, 956 (9th Cir. 1994) (failure to locate documents earlier due to confusion

caused by corporate restructuring did not constitute excusable neglect under Fed. R. Civ. P. 6(b)).

d. Length of Extension

"No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later." Fed. R. App. P. 4(a)(5)(C); *Vahan v. Shalala*, 30 F.3d 102, 103 (9th Cir. 1994) (per curiam) (district court has no discretion to grant extension beyond time set forth in Fed. R. App. P. 4(a)(5)).

e. Appealability of Extension Order

An order granting or denying a motion for extension of time to appeal is an appealable final decision. *See Diamond v. United States Dist. Court*, 661 F.2d 1198, 1198 (9th Cir. 1981) (order); *see also Corrigan v. Bargala*, 140 F.3d 815, 817 n.3 (9th Cir. 1998).

3. EXTENSION OF TIME TO APPEAL UNDER FED. R. APP. P. 4(a)(6)

The district court may reopen the time to file an appeal for 14 days after the date its order to reopen is entered only if:

> (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;
>
> (B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and
>
> (C) the court finds that no party would be prejudiced.

Fed. R. App. P. 4(a)(6). However, even where the requirements of Fed. R. App. P. 4(a)(6) are met, the district court has the discretion to deny the motion. *See Arai v. Am. Bryce Ranches Inc.*, 316 F.3d 1066, 1069 (9th Cir. 2003).

a. Timeliness of Motion for Extension

A motion under Fed. R. App. P. 4(a)(6) must be filed "within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier. . . ." Fed. R. App. P. 4(a)(6)(B); *see also Nunley v. City of Los Angeles*, 52 F.3d 792, 794 (9th Cir. 1995) (holding that the seven-day period is triggered by "actual notice"). Fed. R. App. P. 4(a)(6) allows "any winning party to shorten the 180-day period by sending (and establishing proof of receipt of) its own notice of entry of a judgment, as authorized by Fed. R. Civ. P. 77(d)." *See* 119 Adv. Comm. Notes to Fed. R. App. P. 4(a)(6).

The district court has no authority to extend time to appeal if a motion for extension is not timely filed. *See Vahan v. Shalala*, 30 F.3d. 102, 103 (9th Cir. 1994) (per curiam).

b. Form of Motion for Extension

As a general rule, Fed. R. App. P. 4(a)(6) requires a formal motion served in accordance with local rules. *See Nunley v. City of Los Angeles*, 52 F.3d 792, 795 (9th Cir. 1995).

However, an ex parte application may suffice where the opposing party is informed of the ex parte application, does not object, and responds to it. *See id.* (noting district court's broad discretion to depart from local rules where substantial rights not at stake).

c. Standard for Granting Motion for Extension

To qualify for relief under Fed. R. App. P. 4(a)(6), a party must have been entitled to notice of entry of a judgment or order and must not have received the notice within the requisite time period. *See* Fed. R. App. P. 4(a)(6).

i. Entitlement to Notice of Entry of Judgment

The district court clerk must immediately upon entry of judgment serve notice of entry "on each party who is not in default for failure to appear." Fed. R. Civ. P. 77(d)(1). A party may also serve notice of entry. *See id.*

"Once a party has appeared generally in an action, he is entitled to notice of all proceedings and actions taken in the case, irrespective of whether he failed to 'appear' at some subsequent stage of the proceedings." *Molloy v. Wilson*, 878 F.2d 313, 315 (9th Cir. 1989) (citations omitted).

ii. Failure to Receive Notice of Entry of Judgment

When a party is represented by an attorney, service "must be made on the attorney unless the court orders service on the party." Fed. R. Civ. P. 5(b); *see also Alaska Limestone Corp. v. Hodel*, 799 F.2d 1409, 1412 (9th Cir. 1986) (per curiam) ("[R]eceipt of notice by one of two counsel of record . . . sufficiently informs the party of the entry of judgment." (citation omitted)).

The burden is on the moving party to show non-receipt of notice of entry of judgment. *See Nunley v. City of Los Angeles*, 52 F.3d 792, 795 (9th Cir. 1995). The following principles apply in determining whether the moving party meets its burden: (1) proper mailing of notice raises a rebuttable presumption that it was received by the addressee, *see id.* at 796 & n.5 (concluding that notation on order and docket that notice was sent raised presumption of receipt where post office did not return envelope); (2) the presumption is rebutted by a "specific factual denial of receipt," *id.* at 796; and (3) if the presumption is rebutted, "a district judge must then weigh the evidence and make a considered factual determination concerning receipt, rather than denying the motion out of hand based upon proof of mailing," *id.* at 796-97 (stating that district court's factual determination is reviewed for clear error on appeal).

"[W]here non-receipt has been proven and no other party would be prejudiced, the denial of relief cannot rest on a party's failure to learn independently of the entry of judgment during the thirty-day period for filing notices of appeal." *Id.* at 798 (noting that the concept of "excusable neglect" is

inapplicable in the context of determining whether an extension should be granted under Fed. R. App. P. 4(a)(6)).

iii. Absence of Prejudice to Any Party

The district court may reopen the time period for appeal under Fed. R. App. P. 4(a)(6) only if no party would be prejudiced. *See* Fed. R. App. P. 4(a)(6)(C). Prejudice consists of "some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal." *See* 1991 Adv. Comm. Notes to Fed. R. App. P. 4(a)(6) (noting that prejudice might be found where "the appellee had taken some action in reliance on the expiration of the normal time period for filing a notice of appeal.").

d. Length of Extension

The district court may reopen the time to appeal "for a period of 14 days after the date when its order to reopen is entered." Fed. R. App. P. 4(a)(6); *Vahan v. Shalala*, 30 F.3d 102, 103 (9th Cir. 1994) (per curiam) (stating that district court has no discretion to grant extension beyond time set forth in Fed. R. App. P. 4(a)(6)).

e. Appealability of Extension Order

An order granting or denying a motion for extension of time to appeal is an appealable final decision. *See Diamond v. United States Dist. Court*, 661 F.2d 1198, 1198 (9th Cir. 1981) (order); *see also Corrigan v. Bargala*, 140 F.3d 815, 817 n.3 (9th Cir. 1998).

4. EXTENSION OF TIME TO APPEAL UNDER FED. R. CIV. P. 60(b)

A district court may for "compelling reasons" vacate its original entry of judgment and then reenter its judgment to permit an otherwise untimely appeal. *See Zurich Ins. Co. v. Wheeler*, 838 F.2d 338, 340 (9th Cir. 1988) (citation omitted).

Note that it is unclear in this circuit whether the 1991 enactment of Fed. R. App. P. 4(a)(6) precludes the use of Rule 60(b) to cure problems of lack of notice. However, other circuits have held that Rule 60(b) is no longer available for this purpose. *See, e.g.*, *Zimmer St. Louis, Inc. v. Zimmer Co.*, 32 F.3d 357, 360-61 (8th Cir. 1994).

a. Timeliness of Motion for Extension

A Rule 60(b) motion arguing excusable neglect must be "made within a reasonable time . . . and . . . no more than a year after the entry of the judgment or order . . . . " Fed. R. Civ. P. 60(c); *Nevitt v. United States*, 886 F.2d 1187, 1188 (9th Cir. 1989) (holding that time for filing Rule 60(b) motion not tolled by the pendency of an appeal).

Rule 60(b) relief is only available if the excusable neglect arises after the period covered by Fed. R. App. P. 4(a)(5). *See Rodgers v. Watt*, 722 F.2d 456, 459 (9th Cir. 1983) (en banc).

b. Factors Considered in Evaluating Motion for Extension

In determining the applicability of Rule 60(b), the district court should consider: "(1) absence of Rule 77(d) notice; (2) lack of prejudice to respondent; (3) prompt filing of a motion after actual notice; and (4) due diligence, or reason for lack thereof, by counsel in attempting to be informed of the date of the decision." *Rodgers v. Watt*, 722 F.2d 456, 460 (9th Cir. 1983) (en banc) (citation omitted); *see also* Fed. R. Civ. P. 77(d) (requiring clerk to serve notice of entry of judgment). If the district court abuses its discretion in extending the appeal period by vacating and reentering judgment, the court of appeals is without jurisdiction. *See Zurich Ins. Co. v. Wheeler*, 838 F.2d 338, 340 (9th Cir. 1988).

The district court did not abuse its discretion in vacating and reentering judgment where the court clerk failed to notify the parties of entry of judgment, counsel's assistant diligently checked docket, docket entries were out of sequence, and upon learning of entry counsel immediately filed Rule 60(b) motion. *See Rodgers*, 722 F.2d at 461. Along the same lines, the district court's vacation and reentry of judgment was appropriate where the clerk failed to notify the parties of

entry of judgment, counsel diligently checked with the court clerk, the clerk misinformed counsel that the order had not been entered, counsel filed a 60(b) motion within two weeks of discovering entry of judgment, and there was no prejudice to the opposing party. *See* Zurich Ins. Co., 838 F.2d at 340.

The district court did not abuse its discretion in refusing to vacate and reenter judgment where counsel heard court's oral ruling granting summary judgment motion, failed to investigate status of case until after time for appeal had expired, never checked docket, and did not file a Rule 60(b) motion until about eight months after discovering entry of judgment. *See* Stevens v. ITT Sys., Inc., 868 F.2d 1040, 1041-43 nn.3 & 5 (9th Cir. 1989).

E. UNTIMELY FILING NOT EXCUSED BY UNIQUE CIRCUMSTANCES DOCTRINE

Previously, despite the jurisdictional bar to review an untimely appeal, "[u]nder the 'unique circumstances' doctrine, an appellate court [could] hear a late-filed appeal if the delay was induced by affirmative assurances from the district court that the appeal would be timely." Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1462 (9th Cir. 1992) (citation omitted). *But see* Anderson v. Mouradick (In re Mouradick), 13 F.3d 326, 329 n.5 (9th Cir. 1994) (observing that although the Supreme Court has not repudiated the doctrine, recent decisions have "cast doubt upon [its] viability"). However, the Supreme Court in Bowles v. Russell, 127 S. Ct. 2360, 2366 (2007) made clear that the court has "no authority to create equitable exceptions to jurisdictional requirements" and that the use of the "'unique circumstances' doctrine is illegitimate."

1. *OSTERNECK* STANDARD

Prior to the Supreme Court's decision in Bowles v. Russell, 127 S. Ct. 2360, 2366 (2007), this court applied the unique circumstances doctrine where "a party ha[d] performed an act that, if properly done, would postpone the deadline for filing his appeal and ha[d] received specific assurance by a judicial officer that this act ha[d] been properly done." Osterneck v. Ernst & Whinney, 489 U.S. 169, 179 (1989); Fiester v. Turner, 783 F.2d 1474, 1476 (9th Cir. 1986) (order) (noting that the judicial act must occur within the original time period for appeal).

The unique circumstances doctrine was not satisfied where the district court considered and resolved an untimely motion for reconsideration without commenting as to its timeliness. *See* Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1462 (9th Cir. 1992) (noting that party has duty to seek clarification if it believes court has acted ambiguously as to an appeal deadline). Moreover, "some unidentified statement by an unidentified clerk of the district court" as to the time period for appeal did not satisfy the unique circumstances doctrine. *In re the Suspension of Pipkins*, 154 F.3d 1009, 1009 (9th Cir. 1998) (per curiam) (citing *Osterneck*). Additionally, the doctrine was not satisfied where the party did not file a motion that would extend the time to file the notice of appeal and the district court did not represent to party that the time to file appeal would be extended. *See Lobatz v. U.S. W. Cellular of Cal., Inc.*, 222 F.3d 1142, 1146 (9th Cir. 2000). Note that it was "not enough that the court . . . engaged in some ambiguous or implicitly misleading conduct. The court must have explicitly misled a party." *Wiersma v. Bank of the West (In re Wiersma)*, 483 F.3d 933, 940 (9th Cir. 2007) (internal quotations marks and citations omitted) (concluding that doctrine of unique circumstances did not apply where neither the bankruptcy appellate panel or the bankruptcy court had explicitly misled debtors or given affirmative assurances that a subsequent appeal would be timely).

However, the unique circumstances doctrine was deemed satisfied where the district court erroneously granted appellant's motion for extension of time to file a Fed. R. Civ. P. 59(e) motion within the time period for appeal. *See Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 585-86 (9th Cir. 1993) (citing *Barry v. Bowen*, 825 F.2d 1324 (9th Cir. 1987), but not *Osterneck*). Note that *Miller* is a pre-*Bowles* case.

2. PRE-*OSTERNECK* DECISIONS

Osterneck "invalidated" the prior Ninth Circuit standard of reasonable and good faith reliance on judicial action. *See Slimick v. Silva (In re Slimick)*, 928 F.2d 304, 310 (9th Cir. 1990); *see also Wiersma v. Bank of the West (In re Wiersma)*, 483 F.3d 933, 940 (9th Cir. 2007). However, the court has commented on the probable outcome of prior cases under the *Osterneck* standard. *See Slimick*, 928 F.3d. at 310 n.8 (dicta).

F. EFFECT OF POST-JUDGMENT MOTIONS

1. GENERALLY

The effect of a post-judgment motion depends on whether it is a tolling motion (specified in Fed. R. App. P. 4(a)(4)(A)), *see* below, or a non-tolling motion, *see* III.F.3.

2. POST-JUDGMENT TOLLING MOTIONS

a. Generally

"If a party timely files in the district court [a specified tolling motion], the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Fed. R. App. P. 4(a)(4)(A); *McCarthy v. Mayo*, 827 F.2d 1310, 1313 n.1 (9th Cir. 1987) (citations omitted); *see also Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 374 F.3d 857, 863 (9th Cir. 2004).

"If a party files a notice of appeal after the court announces or enters a judgment – but before it disposes of [a specified tolling motion], – the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered." Fed. R. App. P. 4(a)(4)(B)(i). Thus, a notice of appeal filed while a timely post-judgment tolling motion is pending is "held in abeyance until the motion is resolved." *Leader Nat'l Ins. Co. v. Indus. Indemnity Ins. Co.*, 19 F.3d 444, 445 (9th Cir. 1994) (order) (noting that prior to the 1993 amendment, a notice of appeal filed during the pendency of a timely post-judgment tolling motion was a "nullity").

"A party intending to challenge an order disposing of [a tolling motion], or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal . . . within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion." Fed. R. App. P. 4(a)(4)(B)(ii); *see also Pac. Employers Ins. Co. v. Domino's Pizza, Inc.*, 144 F.3d 1270, 1277-78 (9th Cir. 1998) (stating that absent timely notice of appeal from order granting Fed. R. Civ. P. 59 motion, court of appeals lacked jurisdiction to review amended judgment awarding prejudgment interest).

Cross-reference: III.F.3 (regarding non-tolling motions).

b. Tolling Motion Must Be Specifically Enumerated

Under Fed. R. App. P. 4(a)(4)(A), only the following motions toll the time for appeal:

- Motion for judgment under Fed. R. Civ. P. 50(b).
- Motion to amend or make additional findings under Fed. R. Civ. P. 52(b), whether or not granting the motion would alter the judgment.
- Motion for attorney's fees under Fed. R. Civ. P. 54, if the district court extends time to appeal under Fed. R. Civ. P. 58.
- Motion to alter or amend the judgment under Fed. R. Civ. P. 59.
- Motion for a new trial under Fed. R. Civ. P. 59.
- Motion for relief under Fed. R. Civ. P. 60 if the motion is filed no later than 10 days after the judgment is entered.

c. Tolling Motion Must Be Timely Filed

A motion listed in Fed. R. App. P. 4(a)(4) ordinarily tolls time for appeal only if it is timely filed. *See* Fed. R. App. P. 4(a)(4)(A); *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1462 (9th Cir. 1992).

i. Time Period for Filing Tolling Motion

The motions enumerated in Fed. R. App. P. 4(a)(4)(A) must be filed within the following time periods to toll the time to appeal from a final judgment:

- Motion for judgment as a matter of law must be filed "no later than 10 days after the entry of judgment." Fed. R. Civ. P. 50(b).
- Motion to amend or make additional findings of fact must be "filed no later than 10 days after the entry of judgment." Fed. R. Civ. P. 52(b).

- Motion for attorney's fees under Fed. R. Civ. P. 54 "must be filed no later than 14 days after the entry of judgment" unless otherwise provided by statute or court order. Fed. R. Civ. P. 54(d)(2)(B). If before a notice of appeal has been filed and become effective, the district court so orders, the motion tolls the time for appeal. *See* Fed. R. Civ. P. 58; Fed. R. App. P. 4(a)(4)(A)(iii).

- Motion to alter or amend judgment "must be filed no later than 10 days after the entry of the judgment." Fed. R. Civ. P. 59(e).

- Motion for new trial "must be filed no later than 10 days after the entry of the judgment." Fed. R. Civ. P. 59(b).

- Motion for relief from judgment may be timely if filed more than 10 days after entry of judgment, *see* Fed. R. Civ. P. 60(b), but it tolls the time for appeal only if "filed no later than 10 days after the judgment is entered." Fed. R. App. P. 4(a)(4)(A)(vi).

ii. Days Counted in Calculating Deadline for Filing Tolling Motion

In calculating the time to file a tolling motion under Fed. R. Civ. P. 50, 52, or 59, or 60, intermediate Saturdays, Sundays, and legal holidays are excluded. *See* Fed. R. Civ. P. 6(a) (rule applicable where time period is less than 11 days); *see also* *Nunley v. City of Los Angeles*, 52 F.3d 792, 793 n.1 (9th Cir. 1995) (deeming motion served 14 days after entry of judgment timely).

In calculating the time to file a motion for attorney's fees under Fed. R. Civ. P. 54, intermediate Saturdays, Sundays, and legal holidays are included. *See* Fed. R. Civ. P. 6(a) (specifying that rule is applicable where time period is 11 or more days).

iii. Classification of Motion Filed Prior to Entry of Judgment as "Post-Judgment"

The time period for filing a post-judgment motion begins to run upon entry of a separate judgment in compliance with Rule 58. *See* *Carter v. Beverly Hills*

Sav. & Loan Ass'n, 884 F.2d 1186, 1189 (9th Cir. 1989) (Rule 60(b) motion); *Bonin v. Calderon*, 59 F.3d 815, 847 (9th Cir. 1995).

However, in determining whether to classify a motion as pre-judgment or post-judgment, the court looks to the date of the district court's dispositive order, even if it is not set forth on a separate document in accordance with Fed. R. Civ. P. 58. *See Bonin*, 59 F.3d at 847 ("Although entry of judgment on a separate document pursuant to Rule 58 triggers the running of the time limit for filing a notice of appeal and for filing postjudgment motions, the district court's order mark[s] the appropriate threshold between prejudgment and postjudgment motions.").

Thus, a motion filed after a dispositive order is properly treated as a motion for relief from judgment under Fed. R. Civ. P. 60, not as a motion to amend pleadings under Fed. R. Civ. P. 15, even though judgment was not entered on a separate document. *See id.* (noting that because motion was properly treated as a Rule 60(b) motion, it was subject to the cause and prejudice standard).

> *Cross-reference*: III.B (regarding the requirements for entering judgment under Fed. R. Civ. P. 58).

iv. Effect of Premature Tolling Motion

A tolling motion filed after the district court announces its ruling, but before formal judgment is entered, is timely and thus tolls the time period for appeal. *See Larez v. City of Los Angeles*, 946 F.2d 630, 636-37 (9th Cir. 1991) (deeming Rule 59 motion filed before entry of judgment timely); Adv. Comm. Notes to 1995 Amendment to Fed. R. Civ. P. 50(b).

v. Effect of Untimely Tolling Motion

A timely appeal from an untimely tolling motion brings up for review only the post-judgment motion, not the underlying judgment. *See Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1462-63 (9th Cir. 1992); *Fiester v. Turner*, 783 F.2d 1474, 1476 (9th Cir. 1986) (order).

d. Tolling Motion Must Be Written or Recorded

Under the Federal Rules of Civil Procedure, a motion must be in writing "unless made during a hearing or trial." Fed. R. Civ. P. 7(b); *Atchison, Topeka & Santa Fe Ry. Co. v. Cal. State Bd. of Equalization*, 102 F.3d 425, 427 (9th Cir. 1996) (oral comments at status conference did not constitute motion because, unlike a trial or hearing, status conference was not recorded).

e. Tolling Motion Need Not Be Properly Labeled

In determining whether a post-judgment motion is a tolling motion, "nomenclature is not controlling." *Munden v. Ultra-Alaska Assocs.*, 849 F.2d 383, 386 (9th Cir. 1988) (citation omitted). Rather, the court of appeals looks to the substance of the requested relief to see whether it could have been granted pursuant to one of the enumerated tolling motions. *See id.* However, the court does not "strain to characterize artificially" a motion "merely to keep the appeal alive." *Id.*

The following subsections explain when a motion not labeled as one of the tolling motions may nevertheless be treated as tolling motion.

i. Motion to Amend or Vacate Judgment

"[I]f a motion is served within ten days of judgment and it could have been brought under Rule 59(e), it tolls the time for appeal although it does not expressly invoke Rule 59." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1419 (9th Cir. 1984) (citations omitted).

For example, the following motions may be treated as tolling motions even if they do not refer to Fed. R. Civ. P. 59:

- Motion to vacate order of dismissal or summary judgment. *See Hamid v. Price Waterhouse*, 51 F.3d 1411, 1415 (9th Cir. 1995) (dismissal order); *Mir v. Fosburg*, 646 F.2d 342, 344 (9th Cir. 1980) (same); *Tripati v. Henman*, 845 F.2d 205, 206 & n.1 (9th Cir. 1988) (per curiam) (summary judgment order).

- Motion to reconsider order of dismissal or summary judgment. *See* *Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 374 F.3d 857 (9th Cir. 2004) (motion brought under local rule); *Schroeder v. McDonald*, 55 F.3d 454, 459 (9th Cir. 1995) (same); *Bestran Corp. v. Eagle Comtronics, Inc.*, 720 F.2d 1019, 1019 (9th Cir. 1983) (same); *Hoffman v. Gen. Motors Acceptance Corp.*, 814 F.2d 1385, 1387 (9th Cir. 1987) (per curiam).

ii. Motion for Clarification

A motion for clarification that does not seek a substantive change in the judgment generally will be treated as a Fed. R. Civ. P. 60 motion because it implicates the district court's power to correct clerical errors. *See* *Hasbrouck v. Texaco, Inc.*, 879 F.2d 632, 635-36 (9th Cir. 1989) ("A court's failure to memorialize part of its decision is a clerical error." (citation omitted)).

iii. Motion for Attorney's Fees

A motion for attorney's fees generally will not be treated like a Fed. R. Civ. P. 59(e) motion because it "raises legal issues collateral to the main cause of action." *White v. N.H. Dep't of Employment Sec.*, 455 U.S. 445, 451-52 (1982) ("[T]he federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits.") (citation omitted); *United States ex rel. Familian Northwest., Inc. v. RG & B Contractors, Inc.*, 21 F.3d 952, 955 (9th Cir. 1994).

However, a post-judgment motion for attorney's fees may toll the time for appeal if it is filed within 14 days of entry of judgment and the district court extends the time to appeal under Fed. R. Civ. P. 58. *See* Fed. R. Civ. P. 54(d)(2)(B); Fed. R. App. P. 4(a)(4)(A)(iii); *see also* *Stephanie-Cardona LLC v. Smith's Food and Drug Ctrs.*, 476 F.3d 701, 705 (9th Cir. 2007).

iv. Motion for Costs

A post-judgment motion for costs generally will not be treated as a Rule 59(e) motion because it "raises issues wholly collateral to the judgment." *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 267-69 (1988) (per curiam) (motion for

costs under Fed. R. Civ. P. 54(d) did not constitute Rule 59(e) motion); *Durham v. Kelly*, 810 F.2d 1500, 1503 (9th Cir. 1987) (concluding that motion to reallocate costs seeking only clerical changes did not constitute Rule 59(e) motion).

However, a post-judgment motion relating to costs may be treated as a Rule 59(e) motion if it raises a substantive challenge to the appropriateness of awarding costs. *See Whittaker v. Whittaker Corp.*, 639 F.2d 516, 520-21 (9th Cir. 1981) (stating that motion to award costs against a different party, to delete a previous award of costs, or to add a new award of costs may be considered under Rule 59(e)). Additionally, revising a judgment to include mandatory prejudgment interest is not a correction of clerical error subject to no time limit, but rather is an alteration of the judgment, which the party must move for no later than ten days after judgment. *See McCalla v. Royal MacCabees Life Ins. Co.*, 369 F.3d 1128, 1131-32 (9th Cir. 2004).

For example, the following motions related to costs may be construed as Fed. R. Civ. P. 59(e) tolling motions:

- Motion for costs provided "as an aspect of the underlying action." *Buchanan*, 485 U.S. at 268 (dicta).

- Motion to retax costs on the grounds that defendant rather than plaintiffs should be deemed prevailing party. *See Whittaker*, 639 F.2d at 520-21.

- Motion to adjust costs on the grounds that post-offer interest should be considered in determining whether offer of judgment exceeded actual recovery. *See Munden v. Ultra-Alaska Assocs.*, 849 F.2d 383, 387 (9th Cir. 1988).

v. Motion for Prejudgment Interest

A post-judgment motion for discretionary prejudgment interest generally constitutes a Rule 59 motion because, unlike costs and attorney's fees, prejudgment interest is generally considered a part of plaintiff's compensation on the merits, and a motion for discretionary prejudgment interest does not raise issues collateral to the judgment. *See Osterneck v. Ernst & Whinney*, 489 U.S.

169, 175 (1989); *see also* *McCalla v. Royal MacCabees Life Ins. Co.*, 369 F.3d 1128, 1130 (9th Cir. 2004) (not limiting *Osterneck* to post-judgment motions for discretionary interest).

f. Effect of Motion That Lacks Merit or is Procedurally Defective

As long as a tolling motion is timely filed, it generally tolls the time for appeal even though it lacks merit because it fails to include new grounds for granting the motion. *See* *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1249-50 (9th Cir. 1982) (concluding that Rule 59 motion to amend judgment tolled time for appeal even though it "simply rehashe[d] arguments heard at trial"); *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1419 (9th Cir. 1984).

Similarly, a motion tolls the time for appeal even though it is procedurally defective. *See* *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1459 & n.1 (9th Cir. 1988), *vacated on other grounds by* 490 U.S. 1087 (1989), *reinstated by* 886 F.2d 235 (9th Cir. 1989) (stating that Rule 50 motion for judgment as a matter of law tolled time for appeal even though appellant's failure to file a prior motion for directed verdict rendered the Rule 50 motion procedurally defective).

Moreover, a motion that complies with specificity requirements of Fed. R. Civ. P. 7(b) tolls time for appeal even if supporting documents filed outside 10-day time period. *See* *Clipper Exxpress*, 690 F.2d at 1248-49 & n.10 (concluding that, because Rule 59 motion was complete without later filed affidavits, there was no need to decide whether failure to file necessary affidavits at time of motion as required by Fed. R. Civ. P. 6(d) would defeat timeliness).

g. Tolling Motion May Address Any Appealable Order

Under the Federal Rules of Civil Procedure, "any order from which an appeal lies" qualifies as a judgment. Fed. R. Civ. P. 54(a). Thus the time to appeal any decision, whether interlocutory, final or post-judgment, may be tolled under Fed. R. App. P. 4(a)(4) by the timely filing of one of the enumerated motions. *Cf.* *Balla v. Idaho State Bd. of Corrs.*, 869 F.2d 461, 466-67 (9th Cir. 1989).

For example, a timely filed motion that could have been brought under Rule 59 tolls the time to appeal from a preliminary injunction. *See* *United States v. Nutri-cology, Inc.*, 982 F.2d 394, 396-97 (9th Cir. 1992); *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1141 n.4 (9th Cir. 1998), *amended by* 160 F.3d 541 (9th Cir. 1998). Such a motion also tolls the time to appeal from a partial summary judgment certified under Rule 54(b). *See* *Stephenson v. Calpine Conifers II, Ltd.*, 652 F.2d 808, 811 (9th Cir. 1981), *overruled on other grounds by* *Puchall v. Houghton, Cluck, Coughlin, & Riley (In re Washington Pub. Power Supply Sys. Sec. Litig.)*, 823 F.2d 1349, 1351 (9th Cir. 1987) (en banc).

3. NON-TOLLING POST-JUDGMENT MOTIONS

A post-judgment motion not specifically enumerated in Fed. R. App. P. 4(a)(4) does not toll the time period for appeal. *See* Fed. R. App. P. 4(a)(4)(A). Therefore, the final judgment and the order disposing of the post-judgment non-tolling motion must be separately appealed. *See* *Stone v. INS*, 514 U.S. 386, 403 (1995) ("[M]otions that do not toll the time for taking an appeal give rise to two separate appellate proceedings that can be consolidated."); *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990).

If a notice of appeal from a final judgment is filed before disposition of a post-judgment non-tolling motion, the district court retains jurisdiction to decide the motion, and the court of appeals retains jurisdiction to review the judgment. *See* *Stone*, 514 U.S. at 401.

4. MULTIPLE POST-JUDGMENT MOTIONS

If the district court grants a post-judgment motion to amend judgment, a subsequent timely post-judgment tolling motion further tolls the time for appeal. *See* *Munden v. Ultra-Alaska Assocs.*, 849 F.2d 383, 386 (9th Cir. 1988). However, if the district court does not substantively alter its judgment in response to the first motion, a successive motion will not toll the time for appeal. *See* *Wages v. IRS*, 915 F.2d 1230, 1234 n.3 (9th Cir. 1990).

> *Cross-reference*: III.F.2 (regarding the effect and requirements of tolling motions generally).

IV. NOTICE OF APPEAL (Form, Content and Effect on District Court Jurisdiction)

Cross-reference: IV.B (regarding documents constituting notice of appeal); IV.C, (regarding the contents of a notice of appeal); IV.D, (regarding amended notices of appeal); IV.E, p.172 (regarding cross-appeals); IV.F (regarding the effect of notice of appeal on district court jurisdiction).

A. GENERALLY

A notice of appeal must specify the parties appealing, the order or judgment being appealed, and the court to which appeal is taken. *See* Fed. R. App. P. 3(c); *Smith v. Barry*, 502 U.S. 244, 247-48 (1992). However, "[a]n appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice." Fed. R. App. P. 3(c)(4). Although courts should liberally construe the requirements of Fed. R. App. P. 3 in determining compliance, noncompliance precludes jurisdiction. *See Smith*, 502 U.S. at 248).

B. DOCUMENTS CONSTITUTING NOTICE OF APPEAL

1. GENERALLY

A document that does not technically comply with Fed. R. App. P. 3 may nevertheless be effective as a notice of appeal if it is "the functional equivalent of what the rule requires." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988).

A document not denominated a notice of appeal will be treated as such if it: (1) indicates an intent to appeal, (2) is served on other parties, and (3) is filed within the time specified by Fed. R. App. P. 4. *See Rabin v. Cohen*, 570 F.2d 864, 866 (9th Cir. 1978). The purpose of these requirements is to provide sufficient notice to the other parties and the court. *See Smith v. Barry*, 502 U.S. 244, 248-49 (1992) ("If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal.").

Note that Fed. R. App. 3(c)(4) was amended after the above decisions, and now makes clear that "[a]n appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice." Fed. R. App. P. 3(c)(4).

2. PRO SE APPELLANTS

"In determining whether a document will be construed as a notice of appeal, th[e] court uses a more lenient standard when the appellant is not represented by counsel." *Allah v. Superior Court*, 871 F.2d 887, 889 (9th Cir. 1989) (holding that appellate brief constituted notice of appeal); *see also Taylor v. Knapp*, 871 F.2d 803, 805 n.1 (9th Cir. 1989) (holding that motion to proceed in forma pauperis constituted notice of appeal).

"[T]he more lenient standard does not apply to cases in which a party is represented by an attorney, absent extraordinary circumstances." *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1232 (9th Cir. 1989) (holding that motion for stay pending appeal did not constitute notice of appeal). Accordingly, the more lenient standard has been applied only where appellant is not represented by counsel, life or liberty is at stake, or "the interests of substantive justice require it." *Munden v. Ultra-Alaska Assocs.*, 849 F.2d 383, 388 (9th Cir. 1988) (citation omitted) (holding that civil appeal docketing statement did not constitute notice of appeal). *But see Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 618 (9th Cir. 1993) (appellate brief served as notice of appeal); *Noa v. Key Futures, Inc.*, 638 F.2d 77, 78-79 (9th Cir. 1980) (per curiam) (stipulation to enter judgment under Rule 54(b) served as notice of appeal); *Rabin v. Cohen*, 570 F.2d 864, 866 (9th Cir. 1978) (stipulation and motion requesting transfer of prior record and briefs on appeal to new appeal served as notice of cross-appeal).

3. DOCUMENTS CONSTRUED AS NOTICE OF APPEAL

The following documents may satisfy the notice of appeal requirement if they provide notice of the intent to appeal and are filed within the time period for appeal:

- Appellate brief. *See Smith v. Barry*, 502 U.S. 244, 249-50 (1992) (pro se appellant); *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 618 (9th

Cir. 1993) (counseled appellant); *Allah v. Superior Court*, 871 F.2d 887, 889-90 (9th Cir. 1989) (pro se appellant).

- Motion to proceed in forma pauperis. *See Taylor v. Knapp*, 871 F.2d 803, 805 n.1 (9th Cir. 1988) (pro se appellant); *Wilborn v. Escalderon*, 789 F.2d 1328, 1330 (9th Cir. 1986) (pro se appellant);.

- Stipulation to enter judgment under Fed. R. Civ. P. 54(b) following dismissal of appeal on grounds that judgment ran against fewer than all parties. *See Noa v. Key Futures, Inc.*, 638 F.2d 77, 78-79 (9th Cir. 1980) (per curiam).

- Stipulation and motion requesting transfer of prior record and briefs on appeal to new appeal. *See Rabin v. Cohen*, 570 F.2d 864, 866 (9th Cir. 1978) (permitting documents to serve as notice of cross-appeal after initial appeal and cross-appeal dismissed because judgment not properly entered).

- Motion for permission to appeal preliminary injunction. *See San Diego Comm. Against Registration & the Draft (CARD) v. Governing Bd.*, 790 F.2d 1471, 1474 & n.4 (9th Cir. 1986) (noting appeal as of right from preliminary injunction under 1292(a)(1)), *abrogation on other grounds recognized by Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 887 F.2d 935 (9th Cir. 1989).

- "Petition for Leave to Appeal" from final judgment. *See Portland Fed. Employees Credit Union v. Cumis Ins. Soc., Inc.*, 894 F.2d 1101, 1103 (9th Cir. 1990).

- Motion to intervene in appeal. *See Gomez v. Gates (In re Boeh)*, 25 F.3d 761, 762 n.1 (9th Cir. 1994).

- Pro se letter. *See Brannan v. United States*, 993 F.2d 709, 710 (9th Cir. 1993).

- Document filed via facsimile. *See United States v. Clay*, 925 F.2d 299, 301 (9th Cir. 1991), *disapproved on other grounds by Gozlon-Peretz v. United States*, 498 U.S. 395 (1991).

- Certificate of probable cause in counseled habeas case. *See Ortberg v. Moody*, 961 F.2d 135, 137 (9th Cir. 1992).

- Petition for writ of mandamus in case where it is not unreasonable for petitioner to believe order is reviewable only by mandamus, not by direct appeal. *See Compania Mexicana de Aviacion, S.A. v. United States Dist. Court*, 859 F.2d 1354, 1357-58 (9th Cir. 1988) (construing petition as notice of appeal where "no prior authority exists in this circuit for a direct appeal from a denial of foreign sovereign immunity . . . [and] the time for notice of an interlocutory appeal has expired"); *Clorox Co. v. United States Dist. Court*, 779 F.2d 517, 520 (9th Cir. 1985) (construing petition as notice of appeal to prevent manifest injustice where appeal authorized by arguably unforeseeable change in circuit law that occurred after time for direct appeal had elapsed).

  Cross-reference: II.D.3 (regarding construing a notice of appeal as a petition for writ of mandamus).

4. DOCUMENTS NOT CONSTRUED AS NOTICE OF APPEAL

The following documents have been found ineffective as a notice of appeal:

- Motion for stay pending appeal filed by counseled appellant following denial of motion for new trial. *See Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1232 (9th Cir. 1989).

- Document containing petition for rehearing and motion for injunction pending appeal filed by counseled party. *See Cel-A-Pak v. Cal. Agric. Labor Relations Bd.*, 680 F.2d 664, 666-67 (9th Cir. 1982) (per curiam).

- Motion for extension of time to appeal. *See* *Selph v. Council of Los Angeles*, 593 F.2d 881, 882-83 (9th Cir. 1979), *overruled on other grounds by United Artists Corp. v. La Cage Aux Folles, Inc.*, 771 F.2d 1265 (9th Cir. 1985).

- Letter to bankruptcy court requesting transcripts. *See* *Miyao v. Kuntz (In re Sweet Transfer & Storage, Inc.)*, 896 F.2d 1189, 1193 (9th Cir. 1990), *superceded by rule as stated in Arrowhead Estates Development v. Jarrett (In re Arrowhead Estates Development Co.)*, 42 F.3d 1306 (9th Cir. 1994).

- Petition for writ of mandamus in case where it was not reasonable for petitioner to believe order is reviewable only by mandamus, not by direct appeal. *See* *Helstoski v. Meanor*, 442 U.S. 500, 508 (1979). *But see* IV.B.3 (regarding instances where it was considered reasonable to believe an order was reviewable only by mandamus).

C. CONTENTS OF NOTICE OF APPEAL

1. DESIGNATION OF PARTIES APPEALING

a. Fed. R. App. P. 3 Requirements

The notice of appeal must "specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as 'all plaintiffs,' 'the defendants,' 'the plaintiffs A, B, et al.,' or 'all defendants except X'." Fed. R. App. P. 3(c)(1)(A). However, "[a]n appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice." Fed. R. App. P. 3(c)(4).

"In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class." Fed. R. App. P. 3(c)(3).

"A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise." Fed. R. App. P. 3(c)(2).

b. Parties Inadequately Designated

Note that the following decisions predate the amendment to Fed. R. App. P. 3 providing that an appeal will not be dismissed "for failure to name a party whose intent to appeal is otherwise clear from the notice." Fed. R. App. P. 3(c)(4).

Prior to the amendment to Fed. R. App. P. 3, a notice of appeal that named certain appellants but not others, and did not include a generic term adequately identifying the unnamed parties, was ineffective to confer jurisdiction over the unnamed parties. *See Argabright v. United States*, 35 F.3d 472, 474 (9th Cir. 1994), *superceded by statute on other grounds as stated in Miller v. C.I.R.*, 310 F.3d 640 (9th Cir. 2002). For example, the following notices of appeal were ineffective to confer jurisdiction over the unnamed parties:

- Notice of appeal naming one party "et al." in caption, but naming only 15 of 16 plaintiffs in body ineffective as to sixteenth plaintiff. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317-48 (1988).

- Notice of appeal listing only 5 of 6 plaintiffs in caption and referring to "plaintiffs" in body, ineffective as to sixth plaintiff. *See Sauceda v. Dep't of Labor*, 917 F.2d 1216, 1218 (9th Cir. 1990).

- Notice of appeal naming two plaintiffs in caption and body, but not designating remaining plaintiffs at all, ineffective as to unnamed plaintiffs even though district court's order dismissing complaint referred only to the two named plaintiffs. *See Argabright*, 35 F.3d at 474.

- Notice of appeal naming only one of several related corporate plaintiffs ineffective as to unnamed corporations. *See Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 778 F.2d 1365, 1368-69 (9th Cir. 1985).

- Notice of appeal naming corporate defendant but not two individual defendants ineffective as to individual defendants. *See* *Cook & Sons Equip., Inc. v. Killen*, 277 F.2d 607, 609 (9th Cir. 1960).

c. Parties Adequately Designated

In the following instances, the notice of appeal was deemed to adequately designate all parties as appellants:

- Notice of appeal naming one defendant "et al." in caption and referring to "defendants" in body fairly indicated all defendants intended to appeal. *See* *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS*, 892 F.2d 814, 816 (9th Cir. 1989); *see also* *Cammack v. Waihee*, 932 F.2d 765, 768-69 (9th Cir. 1991) (notice sufficient to indicate that all plaintiffs were seeking to appeal).

- Notice of appeal naming one plaintiff "et al." in caption and body fairly indicated all plaintiffs intended to appeal. *See* *Benally v. Hodel*, 940 F.2d 1194, 1197 (9th Cir. 1991).

- Notice of appeal in consolidated action referring to "plaintiffs, as consolidated into this cause" fairly indicated all plaintiffs intended to appeal. *Gilbreath v. Cutter Biological Inc.*, 931 F.2d 1320, 1323 (9th Cir. 1991); *see also* *Hale v. Arizona*, 967 F.2d 1356, 1361 (9th Cir. 1992) (finding notice of appeal referring to "plaintiff consolidated in the captioned cause" effective as to all plaintiffs).

2. DESIGNATION OF ORDER BEING APPEALED

"The notice of appeal . . . must designate the judgment, order, or part thereof being appealed." Fed. R. App. P. 3(c)(1)(B); *see also* *Smith v. Nat'l Steel & Shipbuilding Co.*, 125 F.3d 751, 753 (9th Cir. 1997).

However, "a mistake in designating the judgment appealed from should not bar appeal as long as the intent to appeal a specific judgment can be fairly inferred and the appellee is not prejudiced or misled by the mistake." *United States v. One 1977 Mercedes Benz*, 708 F.2d 444, 451 (9th Cir. 1983). "In determining whether

'intent' and 'prejudice' are present, [the court applies] a two-part test: first, whether the affected party had notice of the issue on appeal; and, second, whether the affected party had an opportunity to fully brief the issue." *Lynn v. Sheet Metal Workers' Int'l Ass'n.*, 804 F.2d 1472, 1481 (9th Cir. 1986).

a. Notice of Appeal Effective Even Though Order Mistakenly or Vaguely Designated

In the following cases, the notice of appeal was deemed effective to appeal the order in question even though that order was mistakenly or vaguely designated:

- Appeal from "that part of the judgment" awarding one defendant attorney's fees and costs provided sufficient notice of intent to appeal underlying judgment as to that defendant where fee award was based on provision in contract at issue in the liability determination. *See Pope v. Savs. Bank of Puget Sound*, 850 F.2d 1345, 1347-48 (9th Cir. 1988).

- Notice of appeal naming both defendants, but only citing judgment in favor of one defendant, provided adequate notice of intent to appeal both judgments where other defendant was served with appellate brief challenging both judgments. *See Lynn v. Sheet Metal Workers' Int'l Ass'n.*, 804 F.2d 1472, 1481 (9th Cir. 1986).

- Notice of appeal that failed to specify order being appealed was effective to appeal that order where entire appellate brief was devoted to challenging that order. *See United States v. $84,740.00 Currency*, 981 F.2d 1110, 1112 (9th Cir. 1992) (noting that appellant specifically reserved the right to appeal the subject order in a stipulated judgment).

- Notice of appeal from "summary judgment" effective to appeal order granting motion on the pleadings entered on the specified date. *See Smith v. Nat'l Steel & Shipbuilding Co.*, 125 F.3d 751, 753-54 (9th Cir. 1997).

b. Notice of Appeal from One Part of Order Deemed to Encompass Other Part of Order

A notice of appeal from partial summary judgment for plaintiffs on the issue of qualified immunity also served as a notice of appeal from denial of summary judgment to defendant on the same issue where the cross-motions were disposed of in the same order but the notice of appeal designated only the portion of the order granting partial summary judgment. *See* *Duran v. City of Douglas*, 904 F.2d 1372, 1375 n.1 (9th Cir. 1997).

c. Notice of Appeal from Final Judgment Deemed to Encompass Prior Rulings

In the following instances, the notice of appeal was deemed to encompass an order not specifically designated, usually because the order merged into the final judgment:

- Notice of appeal from summary judgment adequately raised challenge to dismissal of third party complaint where third parties served with appellate brief addressing issue. *See* *United States v. One 1977 Mercedes Benz*, 708 F.2d 444, 451 (9th Cir. 1983) (noting that appellant had reason to believe she had properly appealed the dismissal as well as the summary judgment in light of the merger doctrine).

- Notice of appeal from final judgment awarding damages also conferred jurisdiction over previous judgment as to liability because liability judgment merged into final judgment. *See* *Sheet Metal Workers' Int'l Ass'n. v. Madison Indus., Inc.*, 84 F.3d 1186, 1193 (9th Cir. 1994) (noting that initial appeal from non-final judgment did not divest district court of jurisdiction to award damages).

- Notice of appeal from summary judgment as to one claim conferred jurisdiction over previous dismissal of other claims because dismissal order merged into final judgment. *See* *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984); *see also* *Yamamoto v. Bank of New*

York, 329 F.3d 1167, 1169 n.2 (9th Cir. 2003), *cert. denied*, 540 U.S. 1149 (2004); *Lovell v. Chandler*, 303 F.3d 1039, 1049 (9th Cir. 2002).

- Notice of appeal from final judgment dismissing the action encompassed prior order dismissing the complaint because prior order was not final. *See Montes v. United States*, 37 F.3d 1347, 1351 (9th Cir. 1994).

- Notice of appeal from order dismissing action encompassed previous order denying appellant's motion to remand where appellees were aware of intent to appeal denial of remand and fully briefed the issue. *See Kruso v. Int'l Tel. & Tel. Corp.*, 872 F.2d 1416, 1422-23 (9th Cir. 1989).

- Notice of appeal from final judgment also served as notice of appeal from denial of motion for leave to amend complaint where issue included in opening brief on appeal. *See Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 691 (9th Cir. 1993).

- Notice of appeal from dismissal order also encompassed earlier dismissal order because "[a]n appeal from a final judgment draws in question all earlier, non-final orders and rulings which produced the judgment." *See Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 872 n.7 (9th Cir. 2004).

  Cross-reference: V.A.1 (regarding the court of appeals' jurisdiction to review prior orders on appeal from final judgment).

d. Notice of Appeal from Post-Judgment Order Deemed to Encompass Final Judgment

"As long as the opposing party cannot show prejudice, courts of appeal may treat an appeal from a postjudgment order as an appeal from the final judgment." *Washington State Health Facilities, Ass'n. v. Washington Dep't of Social & Health Servs.*, 879 F.2d 677, 681 (9th Cir. 1989) (internal quotation marks and citation omitted) (both parties fully briefed the issues on appeal). Note that these decisions

predate the current version of Fed. R. App. P. 4(a)(4)(B) which holds a notice of appeal from final judgment in abeyance until district court disposes of tolling motion (*see* III.F.2):

- Notice of appeal from denial of Rule 59 motion served as notice of appeal from underlying judgment where previous appeal from judgment dismissed as premature due to pendency of Rule 59 motion. *See* *Medrano v. City of Los Angeles*, 973 F.2d 1499, 1503 (9th Cir. 1992).

- Notice of appeal from denial of Rule 60(b) motion extended to underlying judgment where district court incorporated underlying judgment in Rule 60(b) order, appellant's opening brief addressed the propriety of the underlying judgment, and defendants fully briefed the issue. *See* *McCarthy v. Mayo*, 827 F.2d 1310, 1314 (9th Cir. 1987).

e. Effect of Second Notice of Appeal

A second notice of appeal challenging a particular issue may indicate lack of intent to appeal that issue in a previous notice of appeal. *See* *Hasbro Indus., Inc. v. Constantine*, 705 F.2d 339, 343 (9th Cir. 1983) (per curiam) (finding, without discussing contents of first notice of appeal, that issue challenged in second untimely notice of appeal was not subject to review because not within scope of previous timely notice of appeal).

3. SIGNATURE OF APPEALING PARTY OR ATTORNEY

A notice of appeal must be signed by the appealing party or the party's attorney. *See McKinney v. de* *Bord*, 507 F.2d 501, 503 (9th Cir. 1974). "A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise." Fed. R. App. P. 3(c)(2); *see also* *Price v. United States Navy*, 39 F.3d 1011, 1015 (9th Cir. 1994) (holding that notice of appeal signed by sole appellant's husband, explicitly on her behalf, was effective as to appellant because she immediately corrected the notice and no apparent confusion or prejudice resulted).

While the federal rules require a signature on a notice of appeal, the failure to sign a timely notice of appeal does not require the court of appeals to dismiss the appeal, as the lapse is curable and not a jurisdictional impediment. *Becker v. Montgomery*, 532 U.S. 757, 765 (2001).

A corporation's notice of appeal, signed and filed by a corporate officer, is not invalid because it was not signed and filed by counsel. *Bigelow v. Brady (In re Bigelow)*, 179 F.3d 1164, 1165 (9th Cir. 1999); *but see D-Beam Ltd. Partnership v. Roller Derby Skates, Inc.*, 366 F.3d 972, 974 (9th Cir. 2004) (distinguishing *Bigelow* and concluding shareholder's signature was ineffective as to a limited liability partnership, where the shareholder failed to sign the notice of appeal on behalf of the partnership, both the shareholder and the partnership had potential claims on appeal, and the shareholder only referred to "plaintiff" instead of "plaintiffs" in the notice of appeal").

D. AMENDED NOTICE OF APPEAL

The court of appeals "possesses the inherent power to allow a party to amend a notice of appeal even without a formal motion." *Pope v. Savs. Bank of Puget Sound*, 850 F.2d 1345, 1347 (9th Cir. 1988).

1. PERMISSIBLE AMENDMENTS

An appellant must file a notice of appeal or amend a previously-filed notice of appeal to secure review of denial of a post-judgment order. *See* Fed. R. App. P. 4(a)(4)(B)(ii). An appellant may amend a notice of appeal to clarify the orders being appealed, though amendment generally is not necessary for this purpose. *See Pope v. Savings Bank of Puget Sound*, 850 F.2d 1345, 1347 (9th Cir. 1988).

2. IMPERMISSIBLE AMENDMENTS

A notice of appeal cannot be amended to add parties as appellants after the time period for appeal has expired. *See Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 778 F.2d 1365, 1368 (9th Cir. 1985). Moreover, a void notice of appeal cannot be amended to become anything other than a void notice of appeal. *See Trinidad Corp. v. Maru*, 781 F.2d 1360, 1362 (9th Cir. 1986) (per curiam) (treating "amended" notice of appeal as new notice of appeal).

E. CROSS-APPEAL

Generally, "a cross-appeal is required to support modification of the judgment." *Ball v. Rodgers*, 492 F.3d 1094, 1118 (9th Cir. 2007) (internal quotation marks and citation omitted); *Gilliam v. Nevada Power Co.*, 488 F.3d 1189, 1192 n.3 (9th Cir. 2007); *United States v. Bajakajian*, 84 F.3d 334, 338 (9th Cir. 1996), *aff'd by* 524 U.S. 321 (1998); *Engleson v. Burlington N. R.R. Co.*, 972 F.2d 1038, 1041-42 (9th Cir. 1992) (citation omitted). *But see Bryant v. Technical Research Co.*, 654 F.2d 1337, 1341 (9th Cir. 1981) (internal quotation and citation omitted) (stating that once an initial appeal has been filed, a "cross-appeal is only the proper procedure, not a jurisdictional prerequisite"); *see also Lee v. Burlington N. Santa Fe Ry. Co.*, 245 F.3d 1102, 1107 (9th Cir. 2001).

The requirement of a notice of cross-appeal is a rule of practice that can be waived at the court's discretion, not a jurisdictional prerequisite, once the court's jurisdiction has been invoked by the filing of the initial notice of appeal. *Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1298 (9th Cir. 1999). Although "[o]rdinarily, a late notice of cross-appeal is not fatal because the court's jurisdiction over the cross-appeal derives from the initial notice of appeal," where the "notice of appeal ... itself [is] untimely, there [is] no prior invocation of jurisdiction that [can] sustain the cross-appeal." *Stephanie-Cardona LLC v. Smith's Food & Drug Ctrs., Inc.*, 476 F.3d 701, 705 (9th Cir. 2007).

In deciding whether to allow a cross-appeal that has not been properly noticed, the court considers factors such as the interrelatedness of the issues on appeal and cross-appeal, whether a notice of cross-appeal was merely late or not filed at all, whether the nature of the district court opinion should have put the appellee on notice of the need to file a cross-appeal, the extent of any prejudice to the appellant caused by the absence of notice, and – in a case involving certification of an interlocutory appeal – whether the scope of the issues that could be considered on appeal was clear. *Mendocino Envtl. Ctr.*, 192 F.3d at 1299.

1. ARGUMENT SUPPORTING JUDGMENT

"[A]rguments that support the judgment as entered can be made without a cross-appeal." *Engleson v. Burlington N. R.R. Co.*, 972 F.2d 1038, 1041-42 (9th Cir. 1992) (citation omitted). An argument in support is permitted even if it

presents alternative grounds for affirmance, *see* *Rodrigues v. Herman*, 121 F.3d 1352, 1355 n.2 (9th Cir. 1997), or was explicitly rejected by the district court, *see* *United States v. Hilger*, 867 F.2d 566, 567 (9th Cir. 1989) (permitting defendant to argue improper venue as alternative ground for affirming even though district court rejected argument in granting motion to dismiss); *Engleson*, 972 F.2d at 1041-42 (permitting defendant to argue statute of limitations as alternative ground for affirming summary judgment even though district court rejected argument in denying motion to dismiss). *See also* *Gilliam v. Nevada Power Co.*, 488 F.3d 1189, 1192 n.3 (9th Cir. 2007) (addressing argument even though it failed to cross-appeal where Nevada Power Co. was not trying to enlarge its rights, but rather only offered a slightly different ground to support affirming the district court judgment); *Rivero v. City & County of San Francisco*, 316 F.3d 857, 862 (9th Cir. 2002) (explaining that "an appellee [may] argue an alternative ground for affirming a district court judgment without taking a cross-appeal, when the only consequence of the court of appeals' agreement with the argument would be the affirmance of the judgment").

2. ARGUMENT ATTACKING JUDGMENT

"An appellee who fails to file a cross-appeal cannot attack a judgment with a view towards enlarging his own rights." *Spurlock v. FBI*, 69 F.3d 1010, 1018 (9th Cir. 1995). *But see* *Interstate Prod. Credit Ass'n. v. Firemen's Fund Ins. Co.*, 944 F.2d 536, 538 & n.1 (9th Cir. 1991) (citing the merger doctrine, court considered grant of partial summary judgment to appellant even though appellee did not file cross-appeal).

In the following instances, failure to file a cross-appeal precluded appellee from raising an argument attacking the judgment:

- Appellee could not argue district court erred by reducing its attorney's fee award. *See* *Doherty v. Wireless Broad. Sys. of Sacramento, Inc.*, 151 F.3d 1129, 1131 (9th Cir. 1998).

- Appellee could not argue district court erred in finding certain documents exempt from disclosure. *See* *Spurlock*, 69 F.3d at 1018.

- Appellee could not argue on appeal from jury verdict that district court erred in denying its motion seeking qualified immunity. *See* *Gulliford v. Pierce County*, 136 F.3d 1345, 1351 (9th Cir. 1998).

- Appellees could not argue district court erred in determining they had no property right to continuous water service. *See* *Turpen v. City of Corvallis*, 26 F.3d 978, 980 (9th Cir. 1994) (concluding that argument supported modification of judgment, not affirmance on an alternative ground).

- Appellee could not argue that forfeiture order should be set aside altogether during government appeal claiming amount of forfeiture was too low. *See* *United States v. Bajakajian*, 84 F.3d 334, 338 (9th Cir. 1996), *aff'd by* 524 U.S. 321 (1998) ("[a]lthough pursuant to the Excessive Fines Clause [defendant] cannot be ordered to forfeit any of the unreported currency, he is nonetheless forced to accept the decision of the district court" because his failure to cross-appeal deprived court of appeals of jurisdiction to set aside the order).

3. JURISDICTION OR COMITY ARGUMENT

An appellee who fails to file a cross-appeal may nonetheless challenge subject matter jurisdiction. *See* *Yang v. Shalala*, 22 F.3d 213, 215 n.4 (9th Cir. 1994). As a rule, absent a cross-appeal, an appellee may urge in support of a decree any matter appearing in the record, but may not attack the decree with a view either to enlarging his own rights thereunder or lessening his adversary's rights, and "comity considerations" are inadequate to defeat the institutional interests this rule advances. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479-82 (1999), *vacating* 136 F.3d 610 (9th Cir. 1998).

F. EFFECT OF NOTICE OF APPEAL ON DISTRICT COURT JURISDICTION

"As a general rule, the filing of a notice of appeal divests a district court of jurisdiction over those aspects of the case involved in the appeal." *Stein v. Wood*, 127 F.3d 1187, 1189 (9th Cir. 1997). The divestiture rule is a rule of judicial

economy designed to avoid "the confusion and waste of time that might flow from putting the same issues before two courts at the same time." *Id.* (citation omitted).

However, the court of appeals has recognized exceptions to the divestiture rule to permit district courts to correct clerical errors or clarify its judgment, to supervise the status quo during the pendency of an appeal, or to aid in execution of a judgment. *See Stone v. INS*, 514 U.S. 386, 401-02 (1995) (stating that district courts retain jurisdiction to decide Rule 60(b) motions even after appeal is taken).

> *Cross-reference*: IV.F.6 (regarding exceptions to the divestiture rule).

1. APPEAL FROM FINAL JUDGMENT

While an appeal from a final judgment is pending, the district court generally lacks jurisdiction to adjudicate matters on appeal. For example, the district court lacks jurisdiction to do the following:

- Amend its opinion. *See Pro Sales, Inc. v. Texaco, U.S.A.*, 792 F.2d 1394, 1396 n.1 (9th Cir. 1986).

- Entertain a motion for leave to file an amended complaint. *See Davis v. United States*, 667 F.2d 822, 824 (9th Cir. 1982).

- Quantify sanctions while order imposing sanctions is on appeal. *See Shuffler v. Heritage Bank*, 720 F.2d 1141, 1145 n.1 (9th Cir. 1983) (sanctions imposed in contempt proceedings to enforce prior money judgment).

However, while an appeal from final judgment is pending, the district court generally does retain jurisdiction to adjudicate post-judgment matters, such as:

- Award attorney's fees. *See Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955, 957 (9th Cir. 1983).

- Issue extraordinary discovery order pending appeal. *See* Fed. R. Civ. P. 27(b); *Campbell v. Blodgett*, 982 F.2d 1356, 1357 (9th Cir. 1993).

- Issue order enforcing judgment pending appeal. *See* *Lara v. Secretary*, 820 F.2d 1535, 1543 (9th Cir. 1987) (final judgment and authorization for writ of assistance under Fed. R. Civ. P. 70 entered during appeal of order affirming arbitrator's decision).

- Consider post-judgment motions under Fed. R. Civ. P. 59 and 60. *See* *Stone v. INS*, 514 U.S. 386, 402-03 (1995).

  Cross-reference: III.F (regarding the impact of filing certain post-judgment motions on the jurisdiction of the court of appeals).

2. APPEAL FROM POST-JUDGMENT ORDER

An appeal from a post-judgment order of contempt to enforce a money judgment generally divests the district court of jurisdiction to quantify sanctions imposed pursuant to the contempt finding. *See* *Donovan v. Mazzola*, 761 F.2d 1411, 1415 (9th Cir. 1985).

Cross-reference: II.C.10 (regarding the appealability of contempt and sanctions orders generally).

3. APPEAL FROM PARTIAL JUDGMENT UNDER RULE 54(b)

During the pendency of an appeal from a judgment under Fed. R. Civ. P. 54(b), the district court generally retains jurisdiction to proceed with remaining claims. *See* *Beltz Travel Serv., Inc. v. Int'l Air Transp. Ass'n*, 620 F.2d 1360, 1367 (9th Cir. 1980) (during appeal from order granting partial summary judgment to certain defendants, district court retained jurisdiction to proceed with claims against remaining defendants).

Cross-reference: II.A.3 (regarding the appealability of Fed. R. Civ. P. 54(b) orders generally).

4. APPEAL FROM COLLATERAL ORDER

a. Generally

While an order from a collateral order is pending, the district court generally retains jurisdiction to proceed with the underlying action. *See Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990) (while appeal from order denying motion to compel arbitration was pending, district court retained jurisdiction to proceed with merits of action); *see also* Fed. R. Civ. P. 23(f) ("An appeal [from a class certification order] does not stay proceeding in the district court unless the district judge or the court of appeals so orders.").

b. Qualified Immunity Appeal

However, while an appeal from a pretrial denial of qualified immunity is pending, the district court is generally deprived of jurisdiction. *See Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992) (order). Under the doctrine of "dual jurisdiction," the district court may nevertheless proceed with trial during a qualified immunity appeal if it first certifies in writing that the defendants' claim of qualified immunity is frivolous or has been waived. *See id.*; *see also Behrens v. Pelletier*, 516 U.S. 299, 310-11 (1996).

5. APPEAL FROM INTERLOCUTORY ORDER

As a general rule, while an appeal from an interlocutory order is pending, the district court retains jurisdiction to continue with other stages of the case. *See Plotkin v. Pac. Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982). For example:

- During plaintiff's appeal from denial of a preliminary injunction, district court retained jurisdiction to enter summary judgment for defendant. *See id.*

- During defendant's appeal from preliminary injunction, district court retained jurisdiction to enter stipulated dismissal as to certain claims, thereby mooting defendant's appeal as to those claims. *See ACF Indus. Inc. v. Cal. State Bd. of Equalization*, 42 F.3d 1286, 1292 n.4 (9th Cir. 1994) (stating that stipulated dismissal mooted portions of

defendant's appeal from denial of motions considered in conjunction with preliminary injunction on appeal).

- During defendant's interlocutory appeal from criminal contempt order, district court retained jurisdiction to certify for immediate appeal under § 1292(b) a previously-entered order denying defendant's motion to dismiss. *See* *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985).

- "An appeal [from a class certification order] does not stay proceedings in the district court unless the district judge or the court of appeals so orders." Fed. R. Civ. P. 23(f).

  Cross-reference: IV.F.4 (regarding retention of jurisdiction during appeal from order denying qualified immunity).

6. EXCEPTIONS TO DIVESTITURE RULE

The following sections discuss instances where the district court retains jurisdiction over matters within the scope of a pending appeal.

a. Ineffective Notice of Appeal

A notice of appeal from a nonappealable order is a nullity and does not transfer jurisdiction to the court of appeals. *See* *Estate of Conners*, 6 F.3d 656, 659 (9th Cir. 1993) (notice of appeal from order magistrate judge lacked authority to enter); *Christian v. Rhode*, 41 F.3d 461, 470 (9th Cir. 1994) (notice of appeal filed in habeas case prior to probable cause determination); *Ruby v. Secretary*, 365 F.2d 385, 388 (9th Cir. 1966) (notice of appeal from nonfinal order dismissing complaint but not action).

b. Jurisdiction to Clarify Order or Correct Error

Because the divestiture rule should not be employed to defeat its purpose nor to "induce needless paper shuffling," a district court retains jurisdiction to make certain clarifications and corrections even after a notice of appeal is filed. *Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 840 F.2d 730, 734 (9th Cir. 1988) (following notice

of appeal from final judgment, district court retained jurisdiction to enter findings of fact and conclusions of law where it was clear district court intended that they be filed at same time as final judgment) (citation omitted); *see also* *Fed. Trade Comm'n. v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1216 n.11 (9th Cir. 2004) (explaining that district court retained jurisdiction to make findings five days after injunction was granted where the additional findings served to facilitate review); *Silberkraus v. Seely Co. (In re Silberkraus)*, 336 F.3d 864, 869 (9th Cir. 2003) (concluding that bankruptcy court retained jurisdiction to publish written findings of fact and conclusions of law where they were consistent with the court's oral findings and they aided in review of the decision); *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 654-55 (9th Cir. 1991) (following notice of appeal from dismissal for failure to prosecute, district court retained jurisdiction to clarify that appealed order dismissed both state and federal claims with prejudice).

c. Jurisdiction to Maintain Status Quo

"While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(c). Rule 62 codifies a district court's inherent power "to preserve the status quo where, in its sound discretion the court deems the circumstances so justify." *Christian Science Reading Room Jointly Maintained v. City & County of San Francisco*, 784 F.2d 1010, 1017 (9th Cir. 1986) (citation omitted).

i. Jurisdiction to Modify Injunction

The district court's power to maintain the status quo includes the power to modify the terms of the injunction being appealed. *See* " *Christian Science Reading Room Jointly Maintained v. City & County of San Francisco*, 784 F.2d 1010, 1017 (9th Cir. 1986) (concluding that during appeal from permanent injunction district court retained jurisdiction to approve settlement agreement and issue an order pursuant thereto); *Meinhold v. United States*, 34 F.3d 1469, 1480 n.14 (9th Cir. 1994) (concluding that during appeal from permanent injunction district court retained jurisdiction to clarify injunction by broadening scope of relief, and to supervise compliance following filing of contempt motion); *see also* *A & M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1099 (9th Cir. 2002)

(explaining that district court was authorized under Rule 62 to continue supervising compliance with the injunction during the pendency of the appeal).

ii. Jurisdiction to Award Sanctions

Where the district court is supervising a continuing course of conduct pursuant to an injunction, the district court's duty to maintain the status quo pending appeal includes the power to impose sanctions. *See* *Hoffman v. Beer Drivers & Salesmen's Local Union*, 536 F.2d 1268, 1276 (9th Cir. 1976) (stating that while appeal from contempt order for violation of an injunction was pending, district court retained jurisdiction to issue further contempt orders for subsequent violations of the injunction even though the later orders were based in part on the appealed order).

However, while a contempt order imposing a per diem fine is on appeal, the district court does not retain jurisdiction to quantify accrued sanctions following purported compliance by the contemnor. *See* *Donovan v. Mazzola*, 761 F.2d 1411, 1415 (9th Cir. 1985) (concluding district court lacked jurisdiction to quantify sanctions imposed pursuant to order of contempt to enforce money judgment); *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1145 (9th Cir. 1983) (same).

> *Cross-reference*: II.C.10 (regarding the appealability of contempt and sanctions orders generally).

iii. Jurisdiction to Adjudicate Substantive Rights

Although the district court retains jurisdiction "to make orders appropriate to preserve the status quo," it may not "adjudicate substantial rights directly involved in the appeal." *McClatchy Newspapers v. Cent. Valley Typographical Union*, 686 F.2d 731, 734-35 (9th Cir. 1982) (citation omitted) (determining that during appeal from order confirming arbitrator's decision declaring certain rights under labor agreement, district court lacked jurisdiction to adjudicate merits of related substantive issue not covered by judgment on appeal).

V. SCOPE OF APPEAL (Which Orders and Issues Are Considered on Appeal)

The scope of appeal depends on: (1) whether the court of appeals can reach beyond the order providing the basis for appellate jurisdiction to consider other orders and rulings in the case, and (2) whether the parties have waived any issues by failing to adequately raise them.

When the court of appeals has jurisdiction over a district court order, the court has limited authority to consider other rulings and orders in the case. *See* V.A (e.g., an order denying a motion to transfer venue may be reviewed on a subsequent appeal from final judgment even though the order denying transfer is not itself an appealable order).

When a party fails to adequately raise certain issues either at the district court level or on appeal, the court of appeals may deem those issues waived, and decline to consider them. *See* V.B (e.g., the court of appeals need not consider an issue first raised by appellant in its reply brief).

A. ORDERS CONSIDERED ON APPEAL

1. ORDERS CONSIDERED ON APPEAL FROM FINAL DECISION

"An appeal from a final judgment draws in question all earlier, non-final orders and rulings which produced the judgment." *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984); *see also Lovell v. Chandler*, 303 F.3d 1039, 1049 (9th Cir. 2002)

a. Rulings That Merge into a Final Judgment

i. Partial Dismissal

An order dismissing one defendant is reviewable on appeal from a final order dismissing all defendants. *See Munoz v. Small Bus. Admin.*, 644 F.2d 1361, 1364 (9th Cir. 1981).

Cross-reference: II.C.13 (regarding the appealability of dismissal orders generally).

ii. Partial Summary Judgment

An order granting partial summary judgment to appellant was reviewable on appeal from final order granting summary judgment to appellee. *See* *Interstate Prod. Credit Assoc. v. Firemen's Fund Ins. Co.*, 944 F.2d 536, 538 n.1 (9th Cir. 1991).

Cross-reference: IV.E (regarding when it is necessary to file a cross-appeal).

iii. Denial of Immunity

An order denying a motion to dismiss or for summary judgment on grounds of qualified immunity may be appealed upon entry of the order or after final judgment. *See* *DeNieva v. Reyes*, 966 F.2d 480, 484 (9th Cir. 1992).

Cross-reference: II.C.17 (regarding the appealability of immunity orders generally).

iv. New Trial Order

An order granting a new trial is reviewable on appeal from a verdict in a second trial. *See* *Roy v. Volkswagen of Am., Inc.*, 896 F.2d 1174, 1176 (9th Cir. 1990).

v. Class Certification Order

An order decertifying a class, or declining to certify a class, is reviewable on appeal from a final judgment as to individual claims. *See* *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978).

Cross-reference: II.C.8.c (regarding review of class certification orders after final judgment).

vi. Transfer Order

An order denying a motion to transfer venue under 28 U.S.C. § 1404(a) is reviewable on appeal from final judgment. *See Los Angeles Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1399 (9th Cir. 1984) (involving appeal from jury verdict). However, the court of appeals may not review a transfer under 28 U.S.C. § 1404 by a district court outside of its circuit to a district court within its circuit. *See Posnanski v. Gibney*, 421 F.3d 977, 979-80 (9th Cir. 2005) (not following as dicta *Am. Fid. Fire Ins. Co. v. United States Dist. Court*, 538 F.2d 1371, 1377 n.4 (9th Cir. 1976) which stated that order granting motion to transfer venue under § 1404(a) or § 1406(a) is reviewable on appeal from final judgment even if transferor court is outside circuit of reviewing court).

> *Cross-reference*: II.C.29 (regarding the appealability of transfer orders generally).

vii. Disqualification Order

An order denying a motion to disqualify a district court judge is reviewable on appeal from final judgment. *See Thomassen v. United States*, 835 F.2d 727, 732 n.3 (9th Cir. 1987).

> *Cross-reference*: II.C.14 (regarding the appealability of orders disqualifying or declining to disqualify judge or counsel).

viii. Contempt Order

An order of civil contempt against a party to a district court proceeding is reviewable on appeal from final judgment. *See Thomassen v. United States*, 835 F.2d 727, 731 (9th Cir. 1987).

> *Cross-reference*: II.C.10 (regarding the appealability of contempt orders generally).

ix. Interlocutory Injunctive Order

When no interlocutory appeal from an injunctive order is taken under § 1292(a)(1), the interlocutory order merges into the final judgment and may be reviewed on appeal from that judgment. *See* *Balla v. Idaho State Bd. of Corr.*, 869 F.2d 461, 467 (9th Cir. 1989). *But see* *Burbank-Glendale-Pasadena Airport Auth. v. City of Los Angeles*, 979 F.2d 1338, 1340 n.1 (9th Cir. 1992) (stating that where preliminary injunction merges into permanent injunction, court of appeals reviews only permanent injunction).

The following orders, which were immediately appealable but not appealed under 28 U.S.C. § 1292(a)(1), merged into the final judgment:

- Order denying motion to modify injunction merged into final order of contempt because motion to modify and motion for contempt were sufficiently intertwined. *See* *Hook v. Arizona Dep't of Corr.*, 107 F.3d 1397, 1401 (9th Cir. 1997) ("A party does not lose the right to appeal an interlocutory order by not immediately appealing . . . .").

- Order establishing plaintiffs' entitlement to injunctive relief merged into final judgment specifying injunctive relief. *See* *Balla*, 869 F.2d at 467.

- Order granting partial summary judgment, which had effect of denying injunctive relief to opposing party, merged into final judgment following bench trial as to remaining claims. *See* *Baldwin v. Redwood City*, 540 F.2d 1360, 1364 (9th Cir. 1976).

  Cross-reference: II.B.1 (regarding the appealability of preliminary injunction orders under § 1292(a)(1) generally).

x. Order Certified for Permissive Interlocutory Appeal

When timely appeal is not taken from an interlocutory order certified for permissive appeal under 28 U.S.C. § 1292, that order merges into the final judgment and may be reviewed on appeal from that judgment. *See* *Richardson v.*

United States, 841 F.2d 993, 995 n.3 (9th Cir. 1988), *amended by* 860 F.2d 357 (9th Cir. 1988) (reviewing order that established applicable standard of care on appeal from final judgment where district court had certified order for immediate appeal under § 1292(b), appellant's notice of interlocutory appeal was two days late, and district court refused to recertify order).

Cross-reference: II.B.4 (regarding interlocutory permissive appeal under § 1292(b) generally).

xi. Refusal to Rule on Motion

"A failure to rule on a motion is appealable." *See Plumeau v. Sch. Dist. #40 County of Yamhill*, 130 F.3d 432, 439 n.5 (9th Cir. 1997) (considering letter from plaintiffs even though magistrate judge never explicitly ruled on request contained therein because letter could be construed as motion for leave to amend).

b. Rulings That Do Not Merge into Final Judgment

i. Interlocutory Orders Not Affecting Outcome

Orders that were not material to the judgment are not subject to review on appeal from final judgment. *See Nat'l Am. Ins. Co. v. Certain Underwriters at Lloyd's London*, 93 F.3d 529, 540 (9th Cir. 1995) (declining to review order compelling defendants to turn over certain documents during appeal from summary judgment for plaintiff because district court did not consider contested documents due to defendants' refusal to turn them over).

ii. Certain Collateral Orders

Cross-reference: II.A.2 (regarding the collateral order doctrine).

Certain collateral orders are generally not subject to review on appeal from a subsequent final judgment. For example:

(a) Order Denying Intervention as of Right

An order denying intervention as of right is appealable upon entry and does not merge into a final judgment. *See* *United States v. City of Oakland*, 958 F.2d 300, 302 (9th Cir. 1992) (noting that would-be intervenors may seek leave to intervene for purposes of appeal after final judgment).

> *Cross-reference:* II.C.19 (regarding the appealability of intervention orders generally).

(b) Contempt Order against Nonparty

An order awarding sanctions for civil contempt against a nonparty to district court proceedings is appealable upon entry and does not merge into the final judgment in the underlying action. *See* *Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339, 345 (9th Cir. 1983).

> *Cross-reference*: II.C.10 (regarding the appealability of contempt orders generally).

iii. Orders Certified under Rule 54(b)

"Unlike an interlocutory order, which may be appealed either at the time of entry or after final judgment, [an order certified under Rule 54(b) is] final as to the claims and parties within its scope, and [cannot] be reviewed as part of an appeal from a subsequent judgment as to the remaining claims and parties." *Williams v. Boeing Co.*, 681 F.2d 615, 616 (9th Cir. 1982) (per curiam). Thus, the time to appeal an order certified under Rule 54(b), granting summary judgment in favor of certain defendants on certain claims, began to run upon entry of certification order. *See* *id.* (reinstating appeal despite "the lack of understanding of appellate procedure demonstrated by appellant's counsel").

> *Cross-reference*: II.A.3 (regarding orders certified under Fed. R. Civ. P. 54(b)).

iv. Certain Orders Denying Summary Judgment

Ordinarily, an order denying summary judgment will not be reviewed on appeal from final judgment. *See* *Lum v. City & County of Honolulu*, 963 F.2d 1167, 1169-70 (9th Cir. 1992) ("Such a review is a pointless academic exercise.").

(a) Order Denying Summary Judgment Not Reviewed

The court of appeals has declined to review orders denying summary judgment on appeal from subsequent final judgments in the following cases:

- Denial of summary judgment to appellee not reviewed during appeal from final judgment for appellee after bench trial. *See* *Lum v. City & County of Honolulu*, 963 F.2d 1167, 1169-70 (9th Cir. 1992).

- Denial of summary judgment to appellant not reviewed during appeal from judgment for appellee after jury trial. *See* *Locricchio v. Legal Servs. Corp.*, 833 F.2d 1352, 1358-59 (9th Cir. 1987).

- Denial of summary judgment to appellant on appellee's counterclaim not reviewed after directed verdict entered for appellant on that claim. *See* *Gen. Signal Corp. v. MCI Telecomms. Corp.*, 66 F.3d 1500, 1506-07 (9th Cir. 1995) ("[E]ven if denial of summary judgment arguably could prejudice the moving party by forcing it to expend resources on a frivolous claim, that problem is more properly addressed through a motion for interlocutory appeal."); *see also* *Jones v. City of Santa Monica*, 382 F.3d 1052, 1057 (9th Cir. 2004) (the court of appeals does "not review the denial of summary judgment on factual issues when the case proceeds to trial, even if that trial ends with a directed verdict").

(b) Order Denying Summary Judgment Reviewed

"The better cases recognize that on appeal from a final judgment an earlier denial of summary judgment can be reviewed if it becomes relevant upon

disposition of other issues and if the record is sufficiently developed to support intelligent review." *See* *Jones-Hamilton Co. v. Beazer Materials & Serv., Inc.*, 973 F.2d 688, 694 n.2 (9th Cir. 1992) (internal quotation and citation omitted) (noting that court of appeals is not obligated to review denial of summary judgment). Thus, on appeal from summary judgment for defendant, the court of appeals reversed summary judgment for defendant and reversed denial of partial summary judgment for plaintiff where no issues of material fact remained. *See* *id.* at 693-95.

A denial of summary judgment may also be reviewed pursuant to a consent judgment. *See* *United States v. $874,938.00*, 999 F.2d 1323, 1324 n.1 (9th Cir. 1993) (per curiam) (permitting claimant in civil forfeiture proceeding to consent to a judgment that currency be forfeited and then appeal denial of summary judgment premised on a due process theory prior to dispersal).

v. Certain Orders Denying Remand

An order denying a motion to remand for lack of subject matter jurisdiction generally does not merge into final judgment. *See* *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 77 (1996). Rather, on appeal from final judgment the issue is whether the district court had jurisdiction at the time of judgment, not whether removal was proper in the first place. *See* *id.*

Cross-reference: II.C.24 (regarding remand orders generally).

(a) Removal Defect Cured Before Final Judgment

Where an order denying motion to remand erroneously found complete diversity, final judgment nevertheless stood because pretrial dismissal of non-diverse defendant resulted in diversity jurisdiction at the time of judgment. *See* *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 77 (1996) ("To wipe out the adjudication post-judgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system . . . .").

Similarly, where the district court denied a motion to remand even though removal was procedurally defective because certain parties failed to timely join the

notice of removal, final judgment stood because the parties joined the notice of removal before entry of judgment. *See* *Parrino v. FHP, Inc.*, 146 F.3d 699, 704 (9th Cir. 1998) ("[A] procedural defect existing at the time of removal but cured prior to entry of judgment does not warrant reversal and remand of the matter to state court."), *superseded by statute on other grounds as stated in* *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 681 (9th Cir. 2006) .

(b) Removal Defect Not Cured Before Final Judgment

Where an order denying motion to remand erroneously found complete preemption, final judgment was vacated because district court lacked jurisdiction at the time of judgment. *See* *Associated Builders & Contractors, Inc. v. Local 302 Int'l Bhd. of Elec. Workers*, 109 F.3d 1353, 1355-58 (9th Cir. 1997); *Campbell v. Aerospace Corp.*, 123 F.3d 1308, 1315 (9th Cir. 1997).

vi. Orders Preceding Dismissal for Failure to Prosecute

On appeal from a dismissal for failure to prosecute, earlier-entered interlocutory orders are not subject to review "whether the failure to prosecute is purposeful or is a result of negligence or mistake." *Al-Torki v. Kaempen*, 78 F.3d 1381, 1386 (9th Cir. 1996) (citation omitted) (declining to review orders setting aside jury verdict for defendant and granting motion for new trial); *see also* *Ash v. Cvetkov*, 739 F.2d 493, 497-98 (9th Cir. 1984) (declining to review numerous interlocutory rulings); *Huey v. Teledyne, Inc.*, 608 F.2d 1234, 1239 (9th Cir. 1979) (declining to review order denying class certification).

> *Cross-reference*: II.C.13.b.iv (regarding dismissals for failure to prosecute).

vii. Post-Judgment Orders

An order disposing of a 60(b) motion, filed more than 10 days after entry of final judgment, must be separately appealed. *See TAAG Linhas Aereas de* *Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990).

A post-judgment order granting attorney's fees also must be separately appealed. *See* *Farley v. Henderson*, 883 F.2d 709, 711 (9th Cir. 1989).

Cross-reference: III.F.3 (regarding non-tolling post-judgment motions); II.C.21 (regarding post-judgment orders).

2. ORDERS CONSIDERED ON APPEAL FROM AN INJUNCTIVE ORDER UNDER § 1292(a)(1)

The scope of an appeal from an injunctive order under § 1292(a)(1) extends only to "matters inextricably bound up with the injunctive order from which the appeal is taken." *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 902, 905 (9th Cir. 1995). The "inextricably intertwined" standard should be "narrowly construed." *State of Cal., on Behalf of Cal. Dep't of Toxic Substances Control v. Campbell*, 138 F.3d 772, 778-79 (9th Cir. 1998) ("Just because the same facts are involved in both issues does not make the two issues inextricably intertwined.").

Note that previous decisions extending jurisdiction under § 1292(a)(1) to "related issues" in the "interest of judicial economy" did not survive *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995). *See* *Paige v. State of Cal.*, 102 F.3d 1035, 1039 (9th Cir. 1996).

Cross-reference: II.B.1 (regarding injunctive appeals generally).

a. Order Granting or Denying Summary Judgment

The scope of the following injunction appeals extended to orders granting or denying summary judgment to the extent indicated:

- Order granting summary judgment for defendants on liability reviewable on appeal from permanent injunction only to the extent it established liability of plaintiff subject to injunction on appeal. *See* *State of Cal., on Behalf of Cal. Dep't of Toxic Substances Control v. Campbell*, 138 F.3d 772, 778-79 (9th Cir. 1998).

- Order granting partial summary judgment to plaintiff reviewable on appeal from preliminary injunction for plaintiff where summary judgment order provided basis for issuing injunction. *See* *Paige v. State of Cal.*, 102 F.3d 1035, 1040 (9th Cir. 1996) (applying "inextricably bound" standard).

- Order granting summary judgment to defendant reviewable on appeal from dissolution of preliminary injunction for plaintiff where summary judgment order provided basis for dissolving injunction. *See* *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 902, 905 (9th Cir. 1995) (applying "inextricably bound" standard).

- Orders granting partial summary judgment to plaintiff reviewable on appeal from permanent injunction for plaintiff where summary judgment orders provided basis for issuing injunction. *See* *Transworld Airlines, Inc. v. Am. Coupon Exch., Inc.*, 913 F.2d 676, 680-81 (9th Cir. 1990) (although injunction was permanent, appeal was interlocutory because district court retained jurisdiction to determine damages).

- Order granting partial summary judgment to defendant reviewable on appeal from permanent injunction for defendant where summary judgment order provided basis for issuing injunction. *See* *Marathon Oil Co. v. United States*, 807 F.2d 759, 764-65 (9th Cir. 1986) (applying "inextricably bound" standard; although injunction was permanent, appeal was interlocutory because district court retained jurisdiction to conduct an accounting).

However, an order denying partial summary judgment to defendant was not reviewable on appeal from the grant of a preliminary injunction for plaintiff where the record was insufficiently developed to permit review. *See* *Paige*, 102 F.3d at 1040 (applying "inextricably bound" standard).

b. Order Denying Remand

The court of appeals has, in certain cases, reviewed orders denying remand in conjunction with interlocutory orders granting or denying injunctive relief. *See*

Takeda v. Nw. Nat'l Life Ins. Co., 765 F.2d 815, 818 (9th Cir. 1985); *see also O'Halloran v. Univ. of Wash.*, 856 F.2d 1375, 1378 (9th Cir. 1988); *Lou v. Belzberg*, 834 F.2d 730, 733 (9th Cir. 1987). But **note**, these cases rely on the judicial economy rationale that was rejected in *Swint v. Chambers County Comm'n*, 514 U.S. 35, 50-51 (1995).

c. Order Granting or Denying Sanctions

In conjunction with reversing a preliminary injunction, the court of appeals may reverse an order imposing sanctions for violation of the injunction. *See Dollar Rent A Car of Wash., Inc. v. Travelers Indem., Inc.*, 774 F.2d 1371, 1375-76 (9th Cir. 1985); *see also Diamontiney v. Borg*, 918 F.2d 793, 796-97 (9th Cir. 1990) (affirming preliminary injunction for plaintiff and affirming refusal to impose sanctions on defendants for violating injunction under "closely related" standard).

d. Entry of Default

The entry of default was reviewable on appeal from an order granting injunctive relief where the "relief was premised solely upon the entry of default." *See Phoecene Sous-Marine, S.A. v. U.S. Phosmarine, Inc.*, 682 F.2d 802, 805 (9th Cir. 1982) (applying "inextricably bound" test).

e. Order Certifying Class

An order certifying a class is reviewable on appeal from an order granting interim injunction where injunction awards class-wide relief and therefore order upholding injunction necessarily upholds class certification. *See Paige v. State of Cal.*, 102 F.3d 1035, 1039 (9th Cir. 1996) (deciding issue before enactment of Fed. R. Civ. P. 23(f), which specifically provides for appeal from class certification orders); *see also Bates v. United Parcel Serv., Inc.*, 465 F.3d 1069, 1076 (9th Cir. 2006) (exercising jurisdiction to review denial of class certification); *Immigrant Assistance Project of Los Angeles County Fed'n of Labor v. INS*, 306 F.3d 842, 869 (9th Cir. 2003) (exercising jurisdiction to review certification of the class for which the order provided relief).

> *Cross-reference*: II.C.8.a (regarding permissive interlocutory appeal from class certification order under Fed. R. Civ. P. 23(f)).

f. Order Modifying Or Refusing to Modify Injunction

In the following situations, an order granting injunctive relief has been deemed reviewable on appeal from a subsequent order granting or denying a motion to modify the injunction order:

- Order granting an injunction reviewable on appeal from later order denying motion to modify the injunction where motion to modify was filed within ten days of grant of injunction, thereby tolling time period for appeal. *See* *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1420-21 (9th Cir. 1984).

- Order granting injunctive relief reviewable on appeal from later order when the court of appeals "perceives a substantial abuse of discretion or when the new issues raised on reconsideration are inextricably intertwined with the merits of the underlying order." *Gon v. First State Ins. Co.*, 871 F.2d 863, 866-67 (9th Cir. 1989) (citation omitted) (appeal from original injunction would otherwise be untimely).

g. Order Compelling Arbitration

An order compelling arbitration was reviewable on appeal from an order denying an injunction where the purpose of the requested injunction was to "protect or effectuate the district court's order compelling arbitration." *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1379-80 (9th Cir. 1997) (requested injunction would have enjoined state court proceedings while federal arbitration proceeded). Similarly, an order compelling arbitration was reviewable on appeal from an order dissolving an injunction where the district court relied solely on the arbitrator's findings in dissolving the injunction. *See* *Tracer Research Corp. v. Nat'l Envtl. Serv.*, 42 F.3d 1292, 1294 (9th Cir. 1994).

> *Cross-reference*: II.C.4 (regarding the appealability of orders relating to arbitration in actions governed by the Federal Arbitration Act, 9 U.S.C. § 16).

h. Entry of Final Judgment

"[W]here the record is fully developed, the plaintiff requested both preliminary and permanent injunctions on the issues being appealed, and the district court's denial of injunctive relief rested primarily on interpretations of law, not on the resolution of factual issues, [the court of appeals] may consider the merits of the case and enter a final judgment to the extent appropriate." *Beno v. Shalala*, 30 F.3d 1057, 1063 (9th Cir. 1994) (internal quotations and citations omitted) (in reversing denial of motion for preliminary injunction, court of appeals reached merits); *see also Blockbuster Video, Inc. v. City of Tempe*, 141 F.3d 1295, 1301 (9th Cir. 1998) (in affirming in part and reversing in part grant of preliminary injunction, court of appeals directed entry of final judgment).

3. ORDERS CONSIDERED ON APPEAL FROM AN ORDER CERTIFIED UNDER § 1292(b)

a. Only Certified Order May Be Reviewed

On appeal from an order certified under § 1292(b), the court of appeals "may not reach beyond the certified order to address other orders made in the case." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996). *But see Taxel v. Elec. Sports Research (In re Cinematronics, Inc.)*, 916 F.2d 1444, 1448-49 (9th Cir. 1990) (citation omitted) (reviewing issue decided in prior order because "where reconsideration of a ruling material to an order provides grounds for reversal of the entire order, review of issues other than those certified by the district court as 'controlling' is appropriate").

Thus, the court of appeals lacked jurisdiction over the following orders:

- On appeal from certified order denying motion to dismiss plaintiff's *Bivens* claim, court of appeals did not have jurisdiction to review prior orders dismissing plaintiff's FTCA claims. *See United States v. Stanley*, 483 U.S. 669, 677 (1987).

- On appeal from certified order denying motion for partial summary judgment as to plaintiff's malpractice claim in one case, court of appeals lacked jurisdiction to review orders denying motions to

dismiss related claims in companion case. *See* *Durkin v. Shea & Gould*, 92 F.3d 1510, 1515 n.12 (9th Cir. 1996) (passing reference to prior orders in certified order did not confer jurisdiction).

b. Any Ruling Contained in Certified Order May Be Reviewed

The court of appeals may address any issue "fairly included within the certified order" because it is the order, not the controlling question identified by the district court that is appealable. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 204-05 (1996) (citation omitted) (although district court only certified questions regarding types of damages recoverable in action governed exclusively by federal maritime law, court of appeals had jurisdiction to review district court's underlying conclusion that maritime law provided the exclusive remedies); *see also* *Sissoko v. Rocha*, 440 F.3d 1145, 1153 (9th Cir. 2006), *as adopted by* 509 F.3d 947, 948 (9th Cir. 2007) (because district court certified its ruling on a Rule 59(e) motion, the district court therefore also certified its holding that § 1252(g) did not bar jurisdiction and its holding that it need not consider an argument against inferring a *Bivens* remedy); *EEOC v. United Parcel Serv., Inc.*, 424 F.3d 1060, 1073-74 n.11 (9th Cir. 2005) (although UPS argued that court could not affirm under a different rationale, the court of appeals affirmed the district court's partial summary judgment on a basis that was part of the general question that was certified by the district court); *Steering Comm. v. United States*, 6 F.3d 572, 575 (9th Cir. 1993) (although certified order contained mixed questions of law and fact, court of appeals had jurisdiction in multidistrict, multiparty negligence action to review order attributing liability).

Moreover, "where reconsideration of a ruling material to an order provides grounds for reversal of the entire order, review of issues other than those certified by the district court as 'controlling' is appropriate." *Taxel v. Elec. Sports Research (In re Cinematronics, Inc.)*, 916 F.2d 1444, 1448-49 (9th Cir. 1990) (citation omitted) (reviewing issue decided in prior order).

On appeal from orders certified for appeal pursuant to 28 U.S.C. § 1292(b), the court of appeals had pendent jurisdiction to review other interlocutory orders denying motions to dismiss and for summary judgment on the same grounds as the

certified orders. *Streit v. County of Los Angeles*, 236 F.3d 552, 559 (9th Cir. 2001).

Cross-reference: II.B.4 (regarding interlocutory permissive appeals under § 1292(b) generally).

4. ORDERS CONSIDERED ON APPEAL FROM AN ORDER CERTIFIED UNDER FED. R. CIV. P. 54(b)

On appeal from an order certified under Rule 54(b), the court of appeals does not have jurisdiction to review rulings not contained in the certified order. *See Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 179 n.1, 190 n.17 (9th Cir. 1989) (on appeal from certified order granting judgment notwithstanding the verdict as to two claims, court of appeals had jurisdiction to review order conditionally granting new trial as to these claims, but could not reach directed verdict and grant of new trial as to two other claims).

Cross-reference: II.A.3 (regarding the appealability of Fed. R. Civ. P. 54(b) orders generally).

5. ORDERS CONSIDERED ON APPEAL FROM A COLLATERAL ORDER

On appeal from a collateral order, the court of appeals may have jurisdiction to review other rulings that are "inextricably intertwined with" or "necessary to ensure meaningful review of" the appealable collateral order. *See Swint v. Chambers County Comm'n*, 514 U.S. 35, 50-51 (1995) (declining to "definitively or preemptively settle . . . whether or when it may be proper for a court of appeals, with jurisdiction over one ruling, to review . . . related rulings that are not themselves independently appealable").

a. Review of Related Rulings Permitted

On appeal from denial of qualified immunity, court of appeals had jurisdiction to review grant of partial summary judgment as to liability because the two orders were "inextricably intertwined." *Marks v. Clarke*, 102 F.3d 1012, 1018 (9th Cir. 1997) (reversal of qualified immunity rulings necessarily led to reversal of consequent liability rulings). In another

qualified immunity appeal, the court reached the merits of a motion to dismiss for failure to state a claim because it raised only legal issues. *Jensen v. City of Oxnard*, 145 F.3d 1078, 1082-84 (9th Cir. 1998) (not discussing inextricably intertwined standard).

Cross-reference: II.C.17 (regarding the appealability of immunity orders generally).

b. Review of Related Rulings Not Permitted

On appeal from an order denying immunity the court did not have jurisdiction to reach the following determinations:

- Denial of county defendant's motion for summary judgment asserting "a mere defense to liability" not an immunity from suit. *See Swint v. Chambers County Comm'n*, 514 U.S. 35, 43, 51 (1995); *see also Watkins v. City of Oakland*, 145 F.3d 1087, 1092 (9th Cir. 1998) (observing that challenge to municipality's policy and custom is not inextricably intertwined with qualified immunity claims of individual officers).

- Determination whether defendant could be sued for Title IX violation under § 1983. *See Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1449 (9th Cir. 1995).

- Denial of defendant's motion for summary judgment contending plaintiff's claims for prospective relief were moot. *See Malik v. Brown*, 71 F.3d 724, 727 (9th Cir. 1995).

- Merits of underlying action. *See Neely v. Feinstein*, 50 F.3d 1502, 1505 n.2 (9th Cir. 1995).

Cross-reference: II.C.17 (regarding which aspects of the qualified immunity determination itself that are reviewable).

6. ORDERS CONSIDERED ON APPEAL FROM A POST-JUDGMENT ORDER

a. Order Denying Fed. R. Civ. P. 60 Motion

An appeal from denial of a Rule 60 motion brings up for review only the denial of the motion, unless the motion is filed within 10 days of entry of judgment. *See* *Maraziti v. Thorpe*, 52 F.3d 252, 254 (9th Cir. 1995); *Harman v. Harper*, 7 F.3d 1455, 1458 (9th Cir. 1993) (no jurisdiction to consider underlying judgment).

b. Order Denying Motion to Intervene

On appeal from an order denying a motion to intervene for purposes of appeal, the court of appeals had jurisdiction to consider merits. *See* *United States v. Covington Tech. Co.*, 967 F.2d 1391, 1396-97 (9th Cir. 1992) (after reversing district court's denial of government's motion to intervene as a matter of right for purposes of appeal, court of appeals reversed dismissal of underlying action).

Cross-reference: II.C.19 (regarding the appealability of intervention orders generally).

B. ISSUES CONSIDERED ON APPEAL (WAIVER)

1. WAIVER OF JURISDICTIONAL ISSUE

Ordinarily, the court of appeals must raise a jurisdictional issue sua sponte if the parties do not raise it. *See* *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 309 (9th Cir. 1997) (appellate jurisdiction); *Randolph v. Budget Rent-A-Car*, 97 F.3d 319, 323 (9th Cir. 1996) (district court jurisdiction).

a. Appellate Jurisdiction

"Jurisdiction over an appeal is open to challenge at any time." *Fiester v. Turner*, 783 F.2d 1474, 1475 (9th Cir. 1986) (order).

b. District Court Jurisdiction

Failure to challenge district court jurisdiction in district court does not ordinarily constitute waiver. *See* *Attorneys Trust v. Videotape Computer Prods., Inc.*, 93 F.3d 593, 594-95 (9th Cir. 1996). A jurisdictional issue may be raised for the first time on appeal even though it is not of "constitutional magnitude." *Clinton v. City of New York*, 524 U.S. 417, 428 (1998). *See also* *Sentry Select Ins. Co. v. Royal Ins. Co. of America*, 481 F.3d 1208, 1217 (9th Cir. 2007).

i. Issue Not Waived

In the following situations, failure to raise a jurisdictional challenge in district court did not constitute waiver:

- Federal government could argue for first time on appeal that federal statute did not authorize suit by institutional plaintiffs. *See* *Clinton v. City of New York*, 524 U.S. 417, 428 (1998).

- "[D]issapointed plaintiff" could attack subject matter jurisdiction for first time on appeal. *Attorneys Trust v. Videotape Computer Prods., Inc.*, 93 F.3d 593, 594-95 (9th Cir. 1996). *See also* *Sentry Select Ins. Co. v. Royal Ins. Co. of America*, 481 F.3d 1208, 1217 (9th Cir. 2007) (plaintiff attacked admiralty jurisdiction for first time on appeal).

- Stipulation of parties did not cure jurisdictional defect. *See* *Rains v. Criterion Sys., Inc.*, 80 F.3d 339, 342 (9th Cir. 1996).

- Party to fee dispute could challenge district court jurisdiction to award fees without filing cross-appeal. *See* *Yang v. Shalala*, 22 F.3d 213, 216 n.4 (9th Cir. 1994).

- State could raise Eleventh Amendment immunity for the first time on appeal because it "sufficiently partakes of the nature of a jurisdictional bar." *Ashker v. Cal. Dep't of Corrs.*, 112 F.3d 392, 393 (9th Cir. 1997).

ii. Issue Partially Waived

In the following cases, failure to adequately raise a jurisdictional issue in district court resulted in a more limited inquiry by the court of appeals:

- Where plaintiff failed to object to improper removal and the action is subsequently tried on the merits, the court of appeals did not scrutinize the propriety of the initial removal, but instead determined whether or not the district court had jurisdiction at the time final judgment was entered. *See* *Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 702 (1972); *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 941 (9th Cir. 2006); *Harris v. Provident Life & Accident Ins. Co.*, 26 F.3d 930, 932 (9th Cir. 1994); *see also* *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1068 (9th Cir. 2001). *But see* *Kruse v. Hawaii*, 68 F.3d 331, 333-34 (9th Cir. 1995) (examining propriety of initial removal where party failed to object to removal, but instead of trying the action on the merits the district court granted partial summary judgment and remanded the state law claims to state court).

- Where a defendant's pretrial motion to dismiss for lack of personal jurisdiction was denied, and he failed to raise the issue again in a subsequent trial, the court of appeals considered only whether plaintiff established a prima facie case for personal jurisdiction, the standard used by the district court in denying the pretrial motion to dismiss, not whether plaintiff established personal jurisdiction by a preponderance of evidence. *See* *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1319 (9th Cir. 1998).

iii. Issue Waived

In the following instances, failure to raise an issue related to jurisdiction in district court precludes raising it in the court of appeals:

- If a plaintiff fails to raise a substantial question of diversity of citizenship in its pleadings and neglects to contest removal or move for remand, plaintiff may be precluded from challenging diversity on appeal. *See* *Albrecht v. Lund*, 845 F.2d 193, 194 (9th Cir. 1988); *see*

also *Schnabel v. Lui*, 302 F.3d 1023, 1031-32 (9th Cir. 2002) (same). *But see* *U.S. v. Ceja-Prado*, 333 F.3d 1046, 1050-51 (9th Cir. 2003) (remanding to district court where there was a serious question as to the factual predicate for subject matter jurisdiction even though it was not raised below).

- If a defendant fails to challenge plaintiff's standing in district court, and the defect in standing does not undermine existence of a case or controversy, defendant may be precluded from challenging standing on appeal. *See* *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 538 (9th Cir. 1995).

- If neither party objects to exercise of jurisdiction in district court, court of appeals need not sua sponte determine whether district court abused its discretion by proceeding under the Declaratory Judgment Act. *See* *Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1224 (9th Cir. 1998) (en banc).

- If neither party objects to exercise of supplemental jurisdiction in district court, court of appeals need not sua sponte determine whether district court abused its discretion in retaining jurisdiction over pendent state law claims. *See* *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1000-01 (9th Cir. 1997).

- If a state defendant fails to assert *Younger* abstention and urges the district court to adjudicate constitutional issues, it may be precluded from arguing the propriety of abstention on appeal. *See* *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 394 & n.3 (9th Cir. 1995) (*Younger* abstention doctrine raises jurisprudential, not jurisdictional, considerations).

- If a defendant fails to assert a limitations defense in a case "where the language of a [federal] statute of limitations does not speak of jurisdiction, but erects only a procedural bar," he or she may be precluded from raising the issue on appeal. *Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997) (remanding to district

court to determine whether defendant waived statute of limitations contained in 28 U.S.C. § 2401(a)).

2. WAIVER OF ISSUE IN DISTRICT COURT

a. General Rule

As a general rule, the court of appeals "does not consider an issue not passed upon below." *Dodd v. Hood River County*, 59 F.3d 852, 863 (9th Cir. 1995) (quotation and citation omitted); *see also United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978) ("It is immaterial whether the issue was not tried in the district court because it was not raised or because it was raised but conceded by the party seeking to revive it on appeal."). Similarly, documents or facts not presented to the district court are generally not considered by court of appeals. *See United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990); *see also Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 1000 (9th Cir. 2006) (noting that it is rarely appropriate for an appellate court to take judicial notice of facts not before the district court).

In determining whether the district court ruled on an issue, the court of appeals will look to both the oral and the written record. *See Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1458 (9th Cir. 1995) (concluding district court ruled on issue where written order indicated issue had been decided orally).

i. Rule of Discretion

Waiver is generally a rule of discretion not jurisdiction. *See United States v. Northrop Corp.*, 59 F.3d 953, 958 n.2 (9th Cir. 1995). Therefore, the court of appeals may consider an issue not considered by the district court, *see Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 902, 912 (9th Cir. 1995), but it is not required to do so, *see Broad v. Sealaska Corp.*, 85 F.3d 422, 430 (9th Cir. 1996).

ii. Waivable Issues

"Issues" that can be waived include causes of action, factual assertions, and legal arguments. *See Crawford v. Lungren*, 96 F.3d 380, 389 n.6 (9th Cir. 1996) (causes of action waived); *USA Petroleum Co. v. Atl. Richfield Co.*, 13 F.3d 1276,

1284 (9th Cir. 1994) (legal argument waived); *Int'l Union of Bricklayers & Allied Craftsman Local Union v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404-05 (9th Cir. 1985) (factual assertion waived).

iii. Waiver by Failure to Adequately Raise Issue

Although there is no "bright-line" rule, an issue is generally deemed waived if it is not "raised sufficiently for the trial court to rule on it." *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992). "This principle accords to the district court the opportunity to reconsider its rulings and correct its errors." *Id.* The rule of waiver applies to procedural as well as substantive objections. *See Cabrera v. Cordis, Corp.*, 134 F.3d 1418, 1420 (9th Cir. 1998) (failure to object to evidentiary procedure at summary judgment hearing constituted waiver).

(a) Issue Not Adequately Raised

In the following instances, an issue was deemed inadequately raised, and thus waived:

- Party did not comply with district court request for further briefing on issue. *See Foti v. City of Menlo Park*, 146 F.3d 629, 637-38 (9th Cir. 1998).

- Party referred to statutory waiver provision at summary judgment hearing but did not indicate she intended to challenge the provision on disparate treatment grounds. *See Moreno Roofing Co. v. Nagle*, 99 F.3d 340, 343 (9th Cir. 1996).

- Party raised issue in a motion the district court refused to consider because the motion was untimely and violated local rules, and party failed to appeal order refusing to consider issue. *See Palmer v. IRS*, 116 F.3d 1309, 1312-13 (9th Cir. 1997).

- Plaintiff made a claim for injunctive relief in complaint but failed to raise the issue in response to defendant's motion to dismiss on the grounds of immunity from money damages effectively abandoned the

claim and could not raise it on appeal. *See* *Walsh v. Nevada Dept. of Human Resources*, 471 F.3d 1033, 1037 (9th Cir. 2006).

(b) Issue Adequately Raised

In the following instances, an issue was deemed adequately raised, and thus not waived:

- Party failed to file opposition to motion for protective order but filed objections to opposing party's proposed order before district court entered order. *See* *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1079 (9th Cir. 1988).

- Party made due process objection to previously agreed-upon time limits before end of jury trial. *See* *Gen. Signal Corp. v. MCI Telecomms. Corp.*, 66 F.3d 1500, 1507 (9th Cir. 1995).

- Although party did not substantively address state claim for overtime compensation when the district court requested additional briefing, the issue was clearly raise and argued before the district court. *See* *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1130 (9th Cir. 2002).

iv. Waiver by Stipulation or Concession

Even if an issue is raised by the parties, it may be waived via stipulation or concession. *See* *Am. Bankers Mortgage Corp. v. Fed. Home Loan Mortgage Corp.*, 75 F.3d 1401, 1413 (9th Cir. 1996) (precluding plaintiff from pursuing on appeal a claim that was dismissed with prejudice by stipulation of the parties as part of a post-judgment agreement); *Slaven v. Am. Trading Transp. Co.*, 146 F.3d 1066, 1069 (9th Cir. 1998) (precluding party who unequivocally stipulated to settlement from challenging settlement on appeal); *Mendoza v. Block*, 27 F.3d 1357, 1360 (9th Cir. 1994) (precluding plaintiff from challenging evidentiary procedure on appeal, even if it would otherwise have been erroneous, because he unequivocally stated he had no objection to the procedure).

However, the court of appeals has considered an issue to which the parties stipulated where one of the parties later raised the issue and the district court

addressed it on the merits. *See* *Glaziers & Glassworkers v. Custom Auto Glass Distrib.*, 689 F.2d 1339, 1342 n.1 (9th Cir. 1982) (despite parties' stipulation limiting issues for trial, court of appeals could consider issue outside stipulation because plaintiff subsequently raised issue in opposition to motion to dismiss and district court considered contention on the merits). Additionally, if the stipulated judgment was entered into with the intent to preserve appeal, then the court may exercise appellate jurisdiction. *See* *U.A, Local 342 Apprenticeship & Training Trust v. Babcock & Wilcox Constr. Co., Inc.*, 396 F.3d 1056, 1058 (9th Cir. 2005); *see also* *Continental Ins. Co. v. Federal Express Corp.*, 454 F.3d 951, 954 (9th Cir. 2006).

Moreover, the court of appeals has considered an issue expressly waived by a pro se litigant prior to appointment of counsel. *See* *Freeman v. Arpaio*, 125 F.3d 732, 735 n.1 (9th Cir. 1997), *abrogated on different grounds as stated in* *Shakur v. Schriro*, 514 F.3d 878, 885 (9th Cir. 2008).

A state waived its Eleventh Amendment immunity by consenting to prosecution of a case through trial and by submitting a declaration expressly waiving any Eleventh Amendment defense in the case. *Katz v. Regents of the Univ. of Cal.*, 229 F.3d 831, 834-35 (9th Cir. 2000).

b. Exceptions and Exemptions to Rule of Waiver

The court of appeals will consider an issue raised for the first time on appeal "under certain narrow circumstances," where consideration of the issue will not prejudice the opposing party. *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996) (citation omitted); *see also* *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1053 (9th Cir. 2007) (declining to consider a constitutional claim for the first time on appeal).

i. Preventing Manifest Injustice

Court of appeals may consider an issue raised for the first time on appeal "in exceptional circumstances to prevent manifest injustice." *United States v. One 1978 Piper Cherokee Aircraft*, 91 F.3d 1204, 1209 (9th Cir. 1996) (finding no manifest injustice in precluding party from raising government's failure to give notice of forfeiture proceeding where party had actual notice); *Alexopulos by*

Alexopulos v. Riles, 784 F.2d 1408, 1411 (9th Cir. 1986) (finding no manifest injustice where party provides no reason for failing to raise issue in district court); *City of Phoenix v. Com/Systems, Inc.*, 706 F.2d 1033, 1038-39 (9th Cir. 1983) (finding no manifest injustice in precluding party from objecting to admission of testimony, despite exclusion of document upon which testimony based, where document in fact admissible); *see also Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 554 (9th Cir. 2004) (exercising discretion to reach claim raised for first time on appeal to prevent an invasion of privacy rights).

ii. Intervening Change in Law

The court of appeals may also consider an issue raised for the first time on appeal if it "arises while the appeal is pending because of a change in law." *Gates v. Deukmejian*, 987 F.2d 1392, 1407-08 (9th Cir. 1992) (considering defendant's challenge to award of expert witness fees where intervening decision changed law with regard to compensation for expert witness fees); *see also Beck v. City of Upland*, 527 F.3d 853, 867 (9th Cir. 2008) (considering issue where new legal standard arose during briefing of appeal). *But see USA Petroleum Co. v. Atl. Richfield Co.*, 13 F.3d 1276, 1285-86 (9th Cir. 1994) (denying plaintiff discovery to pursue a legal theory it had expressly abandoned in the district court, despite an intervening decision clarifying the theory's requirements).

iii. Intervening Change in Circumstance

A challenge to a contempt finding is not necessarily waived by failure to raise it in a district court "because the propriety and even the nature of the contempt sanction can change over time." *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1481 (9th Cir. 1992).

iv. Pure Question of Law

The court of appeals may consider an issue raised for the first time on appeal "when the issue is purely one of law." *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1488 (9th Cir. 1995); *see also Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 902, 912 (9th Cir. 1995) (court of appeals has discretion to consider purely legal question raised for first time in motion to reconsider grant of summary judgment).

However, a purely legal issue will be entertained on appeal only if "consideration of the issue would not prejudice [the opposing party's] ability to present relevant facts that could affect [the] decision." *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996).

(a) Question Considered

The following questions have been considered for the first time on appeal on the grounds that they are purely legal and the opposing party was not prejudiced:

- Whether vicarious liability could be imposed under 42 U.S.C. § 1985. *See Scott v. Ross*, 140 F.3d 1275, 1283-84 (9th Cir. 1998), *denied sub. nom, Cult Awareness Network v. Scott*, 526 U.S. 1033 (1999).

- Whether Supremacy Clause precluded application of state litigation privilege to bar federal civil rights claim. *See Kimes*, 84 F.3d at 1126.

- Whether defendants were entitled to state-action immunity. *See Columbia Steel Casting Co., Inc. v. Portland Gen. Elec. Co.*, 111 F.3d 1427, 1443 (9th Cir. 1996).

(b) Question Not Considered

The court of appeals has declined to consider legal questions that require further development of the factual record. *See A-1 Ambulance Serv., Inc. v. County of Monterey*, 90 F.3d 333, 337-39 (9th Cir. 1996) (declining to consider whether a binding public service contract trumps constitutional ratemaking requirements); *Animal Prot. Inst. of Am. v. Hodel*, 860 F.2d 920, 927 (9th Cir. 1988) (declining to consider whether practice of permitting animal adopters to use powers of attorney was improper).

The court also declined to consider the argument that dismissal should have been without prejudice where the plaintiff requested that an order dismissing with prejudice be signed, and issue was not purely legal because plaintiff gave no indication what facts could be alleged in an amended complaint to cure the deficiencies. *See Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1488-89 (9th Cir. 1995).

v. Issue Considered by District Court

Even if a party fails to raise an issue in the district court, the court of appeals generally will not deem the issue waived if the district court actually considered it. *See* *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1054 (9th Cir. 2007); *Cadillac Fairview of Cal., Inc. v. United States*, 41 F.3d 562, 565 n.3 (9th Cir. 1994); *Harrell v. 20th Century Ins. Co.*, 934 F.2d 203, 205 & 206 n.1 (9th Cir. 1991) (issue fully briefed by opposing party and considered by district court may be raised on appeal).

vi. Alternative Basis for Affirming

The court of appeals may consider a legal theory not reached by the district court as an alternative ground for affirming a judgment. *See* *Sec. Life Ins. Co. of Am. v. Meyling*, 146 F.3d 1184, 1190 (9th Cir. 1998) (stating that court can affirm "on any ground supported by the record").

vii. Additional Citations

A party is entitled to present additional citations on appeal to strengthen a contention made in district court. *See* *Puerta v. United States*, 121 F.3d 1338, 1341 (9th Cir. 1997); *Lake v. Lake*, 817 F.2d 1416, 1424 (9th Cir. 1987). Moreover, the court of appeals is required to consider new legal authority on appeal from a grant of qualified immunity. *See* *Elder v. Holloway*, 510 U.S. 510, 512 (1994) (holding that court of appeals must consider "all relevant precedents, not simply those cited to, or discovered by, the district court"). *See also* *Moore v. Czerniak*, 534 F.3d 1128, 1146 n.19 (9th Cir. 2008); *Beck v. City of Upland*, 527 F.3d 853, 861 n.6 (9th Cir. 2008).

c. Waiver and Pleadings

i. Factual Allegations

By pleading certain facts in district court, a party may waive the right to allege contrary facts on appeal. *See* *Export Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1470-71 (9th Cir. 1995) (plaintiff could not argue on appeal that defendant was not entitled to sovereign immunity because it was not an agency or

instrumentality of Mexican government where plaintiff alleged defendant was an agency or instrumentality in its complaint).

ii. Causes of Action

A pleading must provide fair notice to defendant of each claim asserted. *See* *Yamaguchi v. United States Dep't of the Air Force*, 109 F.3d 1475, 1481 (9th Cir. 1997). Thus, the plaintiff waived equal protection and due process claims where complaint contained a "passing reference" to claims, and arguments were "newly minted" on appeal. *Crawford v. Lungren*, 96 F.3d 380, 389 n.6 (9th Cir. 1996) ("The district court is not merely a way station through which parties pass by arguing one issue while holding back a host of others for appeal.").

Although a pro se litigant's pleadings are to be liberally construed, "those pleadings nonetheless must meet some minimum threshold in providing a defendant with notice of what it is that it allegedly did wrong." *Brazil v. United States Dep't of Navy*, 66 F.3d 193, 199 (9th Cir. 1995) (claim for wrongful termination waived because not raised in pleadings).

iii. Affirmative Defenses

Failure to plead certain affirmative defenses constitutes waiver. *See* *Singh v. Gonzales*, 499 F.3d 969, 975 (9th Cir. 2007) (deeming defense of res judicata waived where not raised in district court); *Rotec Indus., Inc. v. Mitsubishi Corp.*, 348 F.3d 1116, 1119 (9th Cir. 2003) (holding that claim preclusion was waived); *Clements v. Airport Auth. of Washoe County*, 69 F.3d 321, 328 (9th Cir. 1995) (holding that claim preclusion, but not issue preclusion, was waived); *Nw. Acceptance Corp. v. Lynnwood Equip.*, 841 F.2d 918, 924 (9th Cir. 1987) (deeming defense of novation waived); *see also* *Kelson v. City of Springfield*, 767 F.2d 651, 657 (9th Cir. 1985) (stating that qualified immunity defense is waived if not pled, but where plaintiff could file amended complaint on remand, defendant should be able to file answer raising qualified immunity).

iv. Request for Relief

"A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to

which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c). Failure to request specific relief does not constitute waiver of right to recover relief. *See* *Z Channel, Ltd. v. Home Box Office, Inc.*, 931 F.2d 1338, 1341 (9th Cir. 1991) (although injunctive relief rendered moot, plaintiff could seek damages for first time on appeal because allegations in complaint could give rise to damages award).

v. Repleading Dismissed Claims in Amended Complaint

A plaintiff waives any claims dismissed with leave to amend and not realleged in an amended complaint. *See* *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981).

However, failure to reallege claims dismissed without leave to amend does not constitute waiver. *See* *Parrino v. FHP, Inc.*, 146 F.3d 699, 704 (9th Cir. 1998), *superseded by statute on other grounds as stated in* *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 681 (9th Cir. 2006); *USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, AFL-CIO*, 31 F.3d 800, 812 (9th Cir. 1994) (stating that the "rule only applies to amended complaints that follow upon dismissal with leave to amend"). Similarly, a plaintiff need not replead claims disposed of on summary judgment to avoid waiver. *See* *USS-POSCO Indus. v. Contra County Bldg. & Const. Trades Council*, 31 F.3d 800, 812 (9th Cir. 1994) (counsel not required to risk waiver to avoid sanctions).

d. Waiver and Pretrial Motions

i. Motion to Dismiss

Failure to raise an argument in opposition to dismissal may constitute waiver. *See* *G-K Props. v. Redevelopment Agency of San Jose*, 577 F.2d 645, 648 (9th Cir. 1978) (appellant waived argument that it did not possess certain documents by failing to raise it in opposition to dismissal for noncompliance with discovery order).

Failure to raise an affirmative defense in a motion to dismiss does not constitute waiver because the motion to dismiss is not a responsive pleading. *See* *Morrison v. Mahoney*, 399 F.3d 1042, 1046-47 (9th Cir. 2005).

ii. Motion for Summary Judgment

Failure to raise a legal argument in opposition to summary judgment may constitute waiver. *See Alexopulos by* *Alexopulos v. Riles*, 784 F.2d 1408, 1411 (9th Cir. 1986) (statute of limitation tolling argument waived). Legal theories abandoned at summary judgment stage will not be considered on appeal. *See* *USA Petroleum Co. v. Atl. Richfield Co.*, 13 F.3d 1276, 1284 (9th Cir. 1994) (surveying waiver cases).

Similarly, failure to identify a disputed issue of material fact at summary judgment may constitute waiver. *See* *Int'l Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1405 (9th Cir. 1985) (stating that absent exceptional circumstances "appellants may not upset an adverse summary judgment by raising an issue of fact on appeal that was not plainly disclosed as a genuine issue before the trial court"); *Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652, 655-56 (9th Cir. 1984) (factual assertions waived).

To preserve a claim that summary judgment is premature because of outstanding discovery, a party must demonstrate the unavailability and importance of missing evidence to the district court. *See* Fed. R. Civ. P. 56(f); *Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652, 656 (9th Cir. 1984).

e. Waiver of Trial Issues

i. Peremptory Challenges

Failure to object to use of peremptory challenges "as soon as possible, preferably before the jury is sworn" may constitute waiver. *Dias v. Sky Chiefs, Inc.*, 948 F.2d 532, 534-35 (9th Cir. 1991) (objection waived where not raised until after excluded jurors dismissed, jury sworn, court recessed, motions in limine argued, and other objections made). *But see* *United States v. Thompson*, 827 F.2d 1254, 1257(9th Cir. 1987) (objection not waived where raised right after jury was sworn because objection could not have been raised much earlier and opposing party was not prejudiced).

ii. Admissibility of Evidence

Failure to object to admission of testimony in district court may constitute waiver. *See* *City of Phoenix v. Com/Systems, Inc.*, 706 F.2d 1033, 1038-39 (9th Cir. 1983) (objection to admission of testimony not preserved by objection to admission of document upon which testimony based).

Moreover, a party ordinarily must make an offer of proof in district court to preserve an objection to exclusion of evidence. *See* *Heyne v. Caruso*, 69 F.3d 1475, 1481 (9th Cir. 1995). However, an offer of proof is not necessary where the district court has previously declared an entire class of evidence inadmissible. *See* *id.*

iii. Legal Theory

Failure to raise a legal theory or argument before the district court may constitute waiver. *See* *A-1 Ambulance Serv., Inc. v. County of Monterey*, 90 F.3d 333, 338-39 (9th Cir. 1996) (defendant waived contract argument by failing to raise it at trial); *Martinez v. Shinn*, 992 F.2d 997, 1001 (9th Cir. 1993) (defendants waived argument that statute precluded award of backpay and emotional distress damages by failing to raise it during trial or in motion to amend judgment); *Malhiot v. S. Cal. Retail Clerks Union*, 735 F.2d 1133, 1137 (9th Cir. 1984) (due process argument waived where not raised in pretrial order or at trial).

iv. Jury Instructions

"A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection." Fed. R. Civ. P. 51(c)(1). Rule 51 is "strictly enforced," and a formal objection is required unless the district court is aware of a party's concern with an instruction and further objection would be unavailing. *See* *Larson v. Neimi*, 9 F.3d 1397, 1399 (9th Cir. 1993). Additionally, the court has found waiver of a challenge to a special verdict form by failing to raise the challenges until after the jury had rendered its verdict and was discharged. *See Yeti by* *Molly, Ltd. v. Deckers Outdoor Co.*, 259 F.3d 1101, 1109-10 (9th Cir. 2001).

A claim of error was preserved where the district court refused to give an instruction proposed by the defendant who objected to its omission at the end of the jury charge. *See* *Larson*, 9 F.3d at 1399. Also, where the district court was aware of a party's disagreement with an instruction, a proposed alternative instruction served as an adequate objection. *See* *Gulliford v. Pierce*, 136 F.3d 1345, 1349 (9th Cir. 1998).

Note that failure to object to a jury instruction does not preclude a party from challenging sufficiency of the evidence on appeal based on a legal theory different than that contained in the instruction. *See* *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1426 n.2 (9th Cir. 1993) ("[O]n review of a denial of a [motion for jurisdiction as a matter of law], th[e] court applies the law truly controlling the case, regardless of the jury instructions.").

v. Consistency of Jury Findings

"When the answers [to interrogatories] are consistent with each other but one or more is inconsistent with the general verdict, the court may: (A) approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict; (B) direct the jury to further consider its answers and verdict; or (C) order a new trial." Fed. R. Civ. P. 49(b)(3).

Ordinarily, a party does not waive an objection to inconsistencies in the jury's findings by failing to raise it right away. *See* *Los Angeles Nut House v. Holiday Hardware Corp.*, 825 F.2d 1351, 1354-55 (9th Cir. 1987) (citation omitted) (stating that "such a waiver rule is inconsistent with the language and structure of Rule 49(b)"). However, counsel risks waiver where he or she does not object after being "invited to consider whether or not to discharge the jury." *Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1331 (9th Cir. 1995).

vi. Sufficiency of Evidence

To preserve an objection to sufficiency of the evidence, a party must move for judgment as a matter of law at the close of all the evidence, and if the motion is denied, renew the motion after the verdict. *See* Fed. R. Civ. P. 50(b); *Nitco Holding Corp. v. Boujikian*, 491 F.3d 1086, 1089 (9th Cir. 2007) (party must file a pre-verdict motion pursuant to Fed. R. Civ. P. 50(a) and a post-verdict motion for

judgment as a matter of law to preserve an objection to sufficiency of the evidence).

Accordingly, denial of a motion for directed verdict is not reviewable absent a subsequent motion for judgment notwithstanding the verdict. *See* Nitco, 491 F.3d at 1089. *See also* *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990) (an "ambiguous or inartful request for a directed verdict" may suffice if it adequately raises the issue of evidence sufficiency). Conversely, denial of motion for judgment notwithstanding the verdict is not reviewable absent a prior motion for directed verdict at the close of all the evidence. *See* *Sloman v. Tadlock*, 21 F.3d 1462, 1473 (9th Cir. 1994); *Eberle*, 901 F.2d at 818 (if the district court reserves ruling on a motion for judgment as a matter of law made at the close of plaintiff's evidence, the motion is still in effect at the close of all the evidence).

"[A] party procedurally defaults a civil appeal based on the alleged insufficiency of the evidence to support the verdict if it fails to file a post-verdict motion for judgment notwithstanding the verdict, under Fed. R.Civ.P. 50(b). [Furthermore,] a procedurally barred sufficiency challenge is not subject to plain error review but is considered forfeited." *Nitco*, 491 F.3d at 1088.

However, when findings of fact are made in actions tried without a jury, "[a] party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings." Fed. R. Civ. P. 52(a)(5) (but see "Specificity of Court Findings," below).

vii. Specificity of Court Findings

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon." Fed. R. Civ. P. 52(a). To preserve an objection to lack of specificity of the district court's findings, a party must propose additional or alternate findings or seek amendment of the findings under Fed. R. Civ. P. 52(b). *See* *Reliance Fin. Corp. v. Miller*, 557 F.2d 674, 681-82 (9th Cir. 1977) (noting that party may nevertheless attack finding as erroneous).

Fed. R. Civ. P. 52 does not apply to motions. *See* Fed. R. Civ. P. 52(a); *D'Emanuele v. Montgomery Ward & Co.*, 904 F.2d 1379, 1388 (9th Cir. 1990) (holding that party need not object to lack of findings in order awarding attorney's fees to preserve issue for appeal), *abrogated on other grounds by City of Burlington v. Dague*, 505 U.S. 557 (1992).

viii. Waiver and Post-Trial/Post-Judgment Submissions

Under certain circumstances, the court of appeals may reach issues raised for the first time in a post-trial or post-judgment filing. *See Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992). For example:

- Appellant adequately preserved challenge to scope of sanction by raising it in motion to reconsider contempt order. *See id.* (observing that motion to reconsider gave district court clear opportunity to review validity of its contempt order).

- Appellant permitted to advance argument on appeal that it failed to raise in opposition to summary judgment where district court rejected arguments on the merits in response to appellant's motion to vacate the grant of summary judgment. *See Cadillac Fairview of Cal., Inc. v. United States*, 41 F.3d 562, 565 n.3 (9th Cir. 1994) (per curiam).

- Appellant may be permitted to advance on appeal an argument first raised in motion to reconsider grant of summary judgment where it presents purely questions of law. *See Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 902, 912 (9th Cir. 1995) (appellant argued that district court erroneously "dissected" trademarks).

On the other hand, the court of appeals did not reach late-raised issues in the following instances:

- Appellant not permitted to pursue due process argument raised for first time in motion to reconsider summary judgment. *See*

Intercontinental Travel Mktg., Inc. v. FDIC, 45 F.3d 1278, 1286 (9th Cir. 1995).

- Appellant not permitted to present burden shifting argument on appeal where it had been raised for the first time in a post-trial motion, thereby depriving appellee of opportunity to meet the proposed burden of proof. *See* *Beech Aircraft Corp. v. United States*, 51 F.3d 834, 841 (9th Cir. 1995).

- Appellant not permitted to challenge district court's consideration of affidavits submitted with appellee's post-trial brief where appellant failed to move to strike affidavits in district court. *See* *Yamashita v. People of Guam*, 59 F.3d 114, 117 (9th Cir. 1995).

- The failure of a party to make a timely objection under Fed. R. Civ. P. 54(d)(1) to a district court's cost award constitutes waiver of the right to challenge the cost award. *Walker v. California*, 200 F.3d 624, 626 (9th Cir. 1999) (per curiam).

f. Waiver of Magistrate/Special Master Issues

i. Waiver of Objections to Order of Reference

Parties must object to reference to a magistrate or special master "at the time the reference is made or within a reasonable time thereafter." *Spaulding v. Univ. of Wash.*, 740 F.2d 686, 695 (9th Cir. 1984), *overruled on other grounds by Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987). Failure to timely object results in waiver. *See* *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1410 (9th Cir. 1990) (deeming objection to special master's authority to impose discovery sanctions waived where objection made after several months of meetings, depositions and hearings with special master regarding discovery); *cf.* *Burlington N. R.R. Co. v. Dep't of Revenue*, 934 F.2d 1064, 1069-70 (9th Cir. 1991) (deeming objection 13 days after reference to special master adequate to preserve issue for appeal where order of reference issued sua sponte and without notice).

ii. Waiver of Objection to Magistrate's Findings & Recommendations

When a magistrate judge submits proposed findings and recommendations to the district court under 28 U.S.C. § 636(b), a party has ten days after being served with a copy of the proposed findings to serve and file written objections. *See* 28 U.S.C. § 636(b)(1)(C) (providing that district court review de novo any matter to which objection is made); *see also* *Minetti v. Port of Seattle*, 152 F.3d 1113, 1114 & n.1 (9th Cir. 1998) (per curiam) (discussing applicability of objection procedure under 28 U.S.C. § 636(b)(1)(C)).

The court of appeals has held that, if a party fails to timely object to a nondispositive magistrate order before the presiding district judge, that party forfeits the right to appeal that order. *See* *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174 & n.1 (9th Cir. 1996) (pro se litigant); *see also* *Glenbrook Homeowners Ass'n v. Tahoe Regional Planning Agency*, 425 F.3d 611, 619-20 (9th Cir. 2005).

(a) Factual Findings

Failure to timely object to a magistrate's factual findings constitutes waiver of right to appeal those findings. *See* *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991); *cf.* *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174 & n.1 (9th Cir. 1996).

(b) Legal Conclusions

In a line of cases predating *Simpson*, the court held that failure to timely object to a magistrate's legal conclusions does not constitute waiver of the right to appeal those conclusions. *See* *Britt v. Simi Valley Unified Sch. Dist.*, 708 F.2d 452, 454-55 (9th Cir. 1983) (noting that whether failure to exhaust administrative remedies precludes a § 1983 suit is a question of law); *FDIC v. Zook Bros. Constr. Co.*, 973 F.2d 1448, 1450 n.2 (9th Cir. 1992) (stating that waiver is particularly inappropriate where "both parties have had the opportunity fully to address the question"); *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991); *Gonzalez v. Sullivan*, 914 F.2d 1197, 1200 (9th Cir. 1990) (noting that whether there is

substantial evidence is a question of law). *But see* *McCall v. Andrus*, 628 F.2d 1185, 1187 (9th Cir. 1980) (deeming objections to legal conclusions waived).

In an attempt to reconcile *Britt* and *McCall*, the court has held that failure to object to a magistrate's conclusions of law, in conjunction with failure to raise an issue until the reply brief, constitutes waiver unless "substantial inequity" would result. *Martinez v. Ylst*, 951 F.2d 1153, 1157 & n.4 (9th Cir. 1991) (deeming objection to legal conclusions waived).

(c) Form of Objections

Failure to comply with local rule length limitations did not constitute waiver where appellant timely filed objections to magistrate report. *See* *Smith v. Frank*, 923 F.2d 139, 142 (9th Cir. 1991) ("Such an interpretation would give the local rule an impermissible jurisdictional character.").

iii. Waiver of Objection to Special Master's Findings & Conclusions

Failure to object to a special master's findings and conclusions is treated the same way as failure to object to a magistrate's findings and conclusions. *See* *Smith v. Frank*, 923 F.2d 141 n.1(9th Cir. 1991); *see also* *Stone v. City & County of San Francisco*, 968 F.2d 850, 858 (9th Cir. 1992) (stating that failure to object to factual findings submitted by special master in progress reports resulted in waiver of right to challenge findings underlying contempt order on appeal).

> *Cross-reference*: II.C.20 (regarding appeal from a final judgment entered by a magistrate judge under 28 U.S.C. § 636(c)).

3. WAIVER OF ISSUE IN COURT OF APPEALS

a. Failure to Raise Issue in Earlier Appeal

Under the following circumstances, failure to raise an issue in a prior appeal precluded raising the issue in a subsequent appeal:

- Failure to raise statute of limitations argument in initial 28 U.S.C. § 1292(a)(3) appeal determining rights of certain claimants precluded raising issue on appeal from summary judgment for remaining claimants. *See Kesselring v. F/T Arctic Hero*, 95 F.3d 23, 24 (9th Cir. 1996) (per curiam) (appellant could not raise issue in 28 U.S.C. § 1291 appeal following summary judgment).

- Failure to challenge district court findings underlying preliminary injunction in interlocutory appeal precluded challenging findings in later appeal. *See Munoz v. Imperial County*, 667 F.2d 811, 817 (9th Cir. 1982).

- Failure to attack jury instruction in appeal from verdict in second trial precluded appellant from challenging that instruction on appeal from verdict in fourth trial, even though fourth verdict rested in part on the allegedly erroneous instruction. *See Alioto v. Cowles Communications, Inc.*, 623 F.2d 616, 618 (9th Cir. 1980).

b. Failure to Adequately Brief Issue

An appellate brief must include, among other things, "[the party's] contentions and the reasons for them, with citations to the authorities and parts of the record on which the [party] relies." Fed. R. App. P. 28(a)(9).

i. Issue Waived

The court of appeals "will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief." *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986). Under the following circumstances, an issue may be deemed waived for failure to adequately brief on appeal:

- Issue "referred to in the appellant's statement of the case but not discussed in the body of the opening brief." *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996); *see also Ghahremani v. Gonzales*, 498 F.3d 993, 997-98 (9th Cir. 2007) (challenge to denial of motion to

reconsider considered waived where it was mentioned only three times in the opening brief, and each time only in passing).

- Issue raised in brief but not supported by argument. *See* *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992); *see also* *Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. California*, 536 F.3d 1034, 1039 n.3 (9th Cir. 2008) (concluding claim abandoned where cause of action listed among grounds for appeal, but no argument was advanced in support of reversing district court's judgment with respect to that claim); *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1032 (9th Cir. 2008) (although party appealed interlocutory injunction, it failed to address the issue in either opening or reply brief, and the court considered it waived).

- Issue supported only by statement adopting the arguments of unnamed co-defendants who "may raise this issue." *United States v. Turner*, 898 F.2d 705, 712 (9th Cir. 1990).

- Argument "not coherently developed" in appellate brief. *United States v. Kimble*, 107 F.3d 712, 715 n.2 (9th Cir. 1997).

- Issue raised for the first time in reply brief. *See* *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990).

- Issue raised for the first time at oral argument. *See* *Stivers v. Pierce*, 71 F.3d 732, 740 n.5 (9th Cir. 1995); *United States v. Martini*, 31 F.3d 781, 782 n.2 (9th Cir. 1994).

- Issue raised for first time in letter of supplemental authorities under Fed. R. App. P. 28(j). *See* *United States v. Sterner*, 23 F.3d 250, 252 n.3 (9th Cir. 1994) (stating that ordinarily issue would be deemed waived but in this case court would reach issue to prevent "substantial" inequity (citation omitted)), *overruled on other grounds by* *United States v. Keys*, 95 F.3d 874 (9th Cir. 1996).

- Issue not raised until petition for redetermination deemed waived. *See* *Wilcox v. Comm'r*, 848 F.2d 1007, 1008 n.2 (9th Cir. 1988) (involving pre se litigant).

ii. Issue Not Waived

The court of appeals generally will consider issues not adequately raised if: (1) there is "good cause shown," or "failure to do so would result in manifest injustice;" (2) the issue is raised in the appellee's brief; or (3) failure to properly raise the issue does not prejudice the opposing party. *United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992) (citations omitted).

For example, an issue raised for the first time in a letter of supplemental authorities under Fed. R. App. P. 28(j) has been considered where the law of the circuit changed while the appeal was pending and "substantial inequity" would otherwise result. *See* *United States v. Sterner*, 23 F.3d 250, 252 n.3 (9th Cir. 1994), *overruled on other grounds by United States v. Keys*, 95 F.3d 874 (9th Cir. 1996). The court has also addressed the issue of Noerr-Pennington immunity where not specifically argued by appellant, but addressed in appellee's brief. *See* *Affordable Housing Dev. Corp. v. City of Fresno*, 433 F.3d 1182, 1193 (9th Cir. 2006) (internal quotation marks and citations omitted).

However, an observation in appellee's brief that appellant failed to raise an issue does not constitute raising the issue. *See* *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990).

c. Failure to Provide Adequate Record on Appeal

"If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion." Fed. R. App. P. 10(b)(2).

When an appellant fails to supply necessary transcripts of district court proceedings, the court of appeals can dismiss the appeal or refuse to consider appellant's argument. *See* *Portland Feminist Women's Health Ctr. v. Advocates for Life*, 877 F.2d 787, 789-90 (9th Cir. 1989) (declining to consider whether

district court erred in finding appellants acted in concert with named defendant where appellant failed to provide transcript of contempt hearing).

Accordingly, failure to provide a trial transcript has had the following consequences:

- Appeal claiming trial court's finding and judgment was unsupported by the evidence was dismissed. *See* *Thomas v. Computax Corp.*, 631 F.2d 139, 143 (9th Cir. 1980) (concluding that pro se appellant's claimed inability to pay for transcript did not render transcript "unavailable").

- Appeal raising mixed issues of law and fact dismissed. *See* *Southwest Adm'rs, Inc. v. Lopez*, 781 F.2d 1378, 1379-80 (9th Cir. 1986); *see also* *Syncom Capital Corp. v. Wade*, 924 F.2d 167, 169 (9th Cir. 1991).

- Contention that excluded statement was admissible as prior consistent statement rejected. *See* *Bemis v. Edwards*, 45 F.3d 1369, 1375 (9th Cir. 1995).

d. Explicit Abandonment of Issue on Appeal

Explicit abandonment of an issue on appeal renders any challenge to the district court's ruling on that issue moot. *See* *United Transp. Union v. Skinner*, 975 F.2d 1421, 1425 (9th Cir. 1992) (appellant's stated willingness to adopt and enforce district court's interpretation of statute in question rendered challenge to that interpretation moot), *abrogated by* *Bhd. of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe Ry. Co.*, 516 U.S. 152 (1996).

VI. BANKRUPTCY APPEALS

A. OVERVIEW

1. BANKRUPTCY APPELLATE PROCESS

A bankruptcy case is initially decided by either a bankruptcy court or a district court. *See* VI.A.2.a (regarding determining the origin of a bankruptcy decision).

If a decision is initially made by a bankruptcy court, it is first appealed to either the bankruptcy appellate panel ("BAP") or to a district court before coming to the Ninth Circuit. *See* VI.B.1. If a decision is made by a district court exercising original (rather than appellate) jurisdiction, it is appealed directly to the Ninth Circuit in accordance with the rules governing civil appeals generally. *See* VI.B.2.

> *Cross-reference*: VI.E (regarding certain decisions that are barred from review in the court of appeals).

2. ORIGINS OF BANKRUPTCY APPEALS

a. Allocation of Original Bankruptcy Jurisdiction

Original bankruptcy jurisdiction is allocated between district courts and bankruptcy courts as follows:

> The district court has original jurisdiction over bankruptcy cases. [28 U.S.C.] § 1334. The district court automatically refers such cases to the bankruptcy court. *Id.* § 157(a). The bankruptcy court may enter final orders and judgments in cases under Title 11 of the Bankruptcy Code and in core proceedings. *Id.* § 157(b)(1). In proceedings that are not core proceedings, but are otherwise related to a case under Title 11, the bankruptcy court has jurisdiction to submit proposed findings of fact and conclusions of law but it may not issue final orders

> or judgments. *Id.* § 157(c)(1). The bankruptcy court makes the initial determination whether a case is a core proceeding or an otherwise related proceeding. *Id.*§ 157(b)(3).

Foothill Capital Corp. v. Claire's Food Mkt., Inc. (In re Coupon Clearing Serv., Inc.), 113 F.3d 1091, 1097 (9th Cir. 1997).

b. Determining Origin of Bankruptcy Decision

i. Cases Involving District Courts

A district court is exercising its original jurisdiction unless a bankruptcy court determination was formally appealed to the district court under 28 U.S.C. § 158(a); where no formal appeal to the district court is taken, a case is deemed originally decided by the district court even though the bankruptcy court was also involved. *See Harris v. McCauley (In re McCauley)*, 814 F.2d 1350, 1351-52 (9th Cir. 1987); *Klenske v. Goo (In re Manoa Fin. Co.)*, 781 F.2d 1370, 1371-72 (9th Cir. 1986) (per curiam). *But see Vylene Enters., Inc. v. Naugles, Inc. (In re Vylene Enters.)*, 968 F.2d 887, 891 (9th Cir. 1992) (indicating that nature of bankruptcy proceeding – i.e., whether it was a core or "otherwise related" proceeding – dictates whether district court acted in original or appellate bankruptcy capacity).

ii. Cases Involving the BAP

The BAP can only exercise appellate jurisdiction over bankruptcy court decisions. *See* 28 U.S.C. § 158(a), (c).

B. STATUTORY BASES FOR APPEAL TO NINTH CIRCUIT

1. APPEALS FROM DECISIONS OF BAP OR DISTRICT COURT ACTING IN APPELLATE CAPACITY

a. Generally

The court of appeals has appellate jurisdiction over "final decisions" of the BAP under 28 U.S.C. § 158(d). The court has jurisdiction over "final decisions" of

the district court acting in its appellate capacity under 28 U.S.C. § 158(d) and 28 U.S.C. § 1291. *See* *Dye v. Brown (In re AFI Holding, Inc.)*, 530 F.3d 832, 836-37 (9th Cir. 2008) (order); *Stanley v. Crossland, Crossland, Chambers, MacArthur & Lastreto (In re Lakeshore Vill. Resort, Ltd.)*, 81 F.3d 103, 105 (9th Cir. 1996); *cf.* *Lievsay v. W. Fin. Sav. Bank (In re Lievsay)*, 118 F.3d 661, 663 (9th Cir. 1997) (per curiam) (stating that § 1291 is not applicable to appeals from BAP).

> *Cross-reference*: VI.B.2 (regarding appeals from district courts exercising original bankruptcy jurisdiction); VI.E (regarding certain orders from which appeal is barred).

b. Finality under 28 U.S.C. § 158(d)

The court of appeals may exercise jurisdiction under 28 U.S.C. § 158(d) only if the intermediate decisions by the BAP or district court were final. *See* *Solidus Networks, Inc. v. Excel Innovations, Inc. (In re Excel Innovations, Inc.)*, 502 F.3d 1086, 1092 (9th Cir. 2007); *Silver Sage Partners, Ltd. v. City of Desert Hot Springs (In re City of Desert Hot Springs)*, 339 F.3d 782, 787-89 (9th Cir. 2003); *Universal Life Church, Inc. v. United States (In re Universal Life Church, Inc.)*, 128 F.3d 1294, 1300 (9th Cir. 1997). "[D]ecisions regarding finality under former section 1293 are controlling in cases arising under new section 158." *King v. Stanton (In re Stanton)*, 766 F.2d 1283, 1285 n.3 (9th Cir. 1985) (order); *accord* *La Grand Steel Prods. Co. v. Goldberg (In re Poole, McGonigle & Dick, Inc.)*, 796 F.2d 318, 321 (9th Cir. 1986), *amended by* 804 F.2d 576 (9th Cir. 1986).

> *Cross-reference*: VI.B.1.b.v (regarding requirement that underlying bankruptcy court order must also be final).

i. Standard for Finality

(a) Pragmatic Approach

Under § 158(d), the Ninth Circuit takes a "pragmatic approach" in assessing the finality of intermediate appellate bankruptcy decisions. Under this approach, a bankruptcy court order is considered final "'where it 1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed.'" *Dye v. Brown (In re AFI Holding, Inc.)*, 530 F.3d 832, 836 (9th Cir.

2008) (order) (quoting *In re Lewis*, 113 F.3d 1040, 1043 (9th Cir. 1997)); *see also* *Wiersma v. Bank of the West (In re Wiersma)*, 483 F.3d 933, 939 (9th Cir. 2007); *Saxman v. Educ. Credit Mgmt BJR Corp. (In re Saxman)*, 325 F.3d 1168, 1171-72 (9th Cir. 2003).

The court considers the following factors: (1) the policy against piecemeal litigation; (2) judicial efficiency; (3) the bankruptcy court's role as finder of fact; and (4) the possibility that delay will cause either party irreparable harm. *See* *Walthall v. United States*, 131 F.3d 1289, 1293 (9th Cir. 1997); *see also* *United States v. Fowler (In re Fowler)*, 394 F.3d 1208, 1211 (9th Cir. 2005) (stating that in the Ninth Circuit two distinct tests have developed for determining finality).

(b) Section 1291 Principles Applicable

In assessing the finality of BAP and district court appellate decisions, the court of appeals often relies on principles of finality established in civil cases generally under 28 U.S.C. § 1291. *See* *Vylene Enters. v. Naugles, Inc. (In re Vylene Enters.)*, 968 F.2d 887, 897 (9th Cir. 1992) (district court order vacating and remanding to bankruptcy court was not an appealable "collateral order" within meaning of § 1291); *Sambo's Rests., Inc. v. Wheeler (In re Sambo's Rests., Inc.)*, 754 F.2d 811, 813 (9th Cir. 1985) (finality of district court decision guided by § 1291 principles); *Sulmeyer v. Karbach Enters. (In re Exennium, Inc.)*, 715 F.2d 1401, 1402-03 (9th Cir. 1983) (finding jurisdiction over appeal from BAP under practical finality doctrine of *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-54 (1964)).

> *Cross-reference*: II.A.1.d (regarding the practical finality doctrine); VI.B.2.b.iii (regarding the collateral order doctrine and the *Forgay-Conrad* rule).

ii. Finality of Orders that Affirm or Reverse Outright

BAP and district court decisions that outright affirm or reverse final orders of bankruptcy courts are themselves final orders. *See* *N. Slope Borough v. Barstow (in Re Bankr. Estate of Markair, Inc.)*, 308 F.3d 1057, 1060 (9th Cir. 2002); *Stanley v. Crossland, Crossland, Chambers, MacArthur & Lastreto (In re*

Lakeshore Village Resort, Ltd.), 81 F.3d 103, 105 (9th Cir. 1996) (district court decision); *Sambo's Rests., Inc. v. Wheeler (In re Sambo's Rests., Inc.)*, 754 F.2d 811, 813-15 (9th Cir. 1985) (BAP decision).

However, BAP and district court decisions that affirm or reverse interlocutory bankruptcy court orders are not final and appealable. *See* *Silver Sage Partners, Ltd. v. City of Desert Hot Springs (In re City of Desert Hot Springs)*, 339 F.3d 782, 787 (9th Cir. 2003); *Lievsay v. W. Fin. Sav. Bank (In re Lievsay)*, 118 F.3d 661, 662 (9th Cir. 1997) (per curiam); *see also* *Solidus Networks, Inc. v. Excel Innovations, Inc. (In re Excel Innovations, Inc.)*, 502 F.3d 1086, 1092 (9th Cir. 2007); *Vylene Enters. v. Naugles, Inc. (In re Vylene Enters.)*, 968 F.2d 887, 895 (9th Cir. 1992).

iii. Finality of Orders Involving Remand

BAP and district court decisions that remand for further bankruptcy court proceedings present a "more difficult question" as to finality. *See* *Foothill Capital Corp. v. Clare's Food Mkt., Inc. (In re Coupon Clearing Serv., Inc.)*, 113 F.3d 1091, 1097 (9th Cir. 1997). Specific types of remand orders are discussed in the subsections that follow.

The court of appeals takes a pragmatic approach by balancing several policies in determining whether a remand order may be considered final, including: (1) the need to avoid piecemeal litigation; (2) judicial efficiency; (3) systemic interest in preserving the bankruptcy court's role as the finder of fact; and (4) whether delaying review would cause either party irreparable harm. *Scovis v. Henrichsen*, 249 F.3d 975, 980 (9th Cir. 2001).

(a) Remand for Factfinding on Central Legal Issue

A BAP or district court decision remanding a case to the bankruptcy court for further factual findings on a central issue on appeal is not appealable unless the central issue is legal in nature and its resolution would either: (1) dispose of the case or proceedings, or (2) materially aid the bankruptcy court in reaching its disposition on remand. *See* *Bonner Mall P'ship v. U.S. Bancorp Mortgage Co. (In*

re Bonner Mall P'ship), 2 F.3d 899, 904 (9th Cir. 1993), *dismissed as moot*, 513 U.S. 18, 28-29 (1994).

(b) Remand for Proceedings Independent of Appeal

A BAP or district court decision remanding a case to the bankruptcy court "for new proceedings and factual findings independent of the legal conclusion upon which the bankruptcy court based its decision" is final and appealable. *Sims v. DeArmond (In re Lendvest Mortgage, Inc.)*, 42 F.3d 1181, 1183 (9th Cir. 1994) (court of appeals had jurisdiction over BAP decision reversing a dismissal premised on theory that adversary defendants were entitled as a matter of law to an offset equal to the entire amount of the adversary plaintiff's settlement with another party); *see also DeMarah v. United States (In re DeMarah)*, 62 F.3d 1248, 1250 (9th Cir. 1995) (stating that court of appeals has jurisdiction over district court order reversing and remanding to bankruptcy court "[i]f the matters on remand concern primarily factual issues about which there is no dispute, and the appeal concerns primarily a question of law").

(c) Examples of Final BAP and District Court Remand Decisions

The following BAP and district court appellate decisions were held final and appealable:

- District court order reversing and remanding prior judgment of bankruptcy court as to whether tax claim retained priority status, where there were no facts in dispute. *United States v. Fowler (In re Fowler)*, 394 F.3d 1208, 1211 (9th Cir. 2005).

- District court order reversing bankruptcy court decision rejecting unpaid taxes claim was final where it would be efficient to resolve the legal question of burden-of-proof rubrics for tax claims. *Neilson v. United States (In re Olshan)*, 356 F.3d 1078, 1083 (9th Cir. 2004).

- District court order vacating bankruptcy court's discharge of debt and remanding where the legal issue of discharge was entirely independent

of factual issues. *Saxman v. Educ. Credit Mgmt. BJR Corp. (In re Saxman)*, 325 F.3d 1168, 1172 (9th Cir. 2003).

- District court order remanding due to disputed material facts was final where dispute actually involved legal rather than factual inferences (i.e. existence of an agency) and resolution of the legal issues on appeal would dispose of summary judgment motions and obviate need for factfinding. *See Foothill Capital Corp. v. Clare's Food Mkt., Inc. (In re Coupon Clearing Serv., Inc.)*, 113 F.3d 1091, 1098-99 (9th Cir. 1997).

- District court order affirming in part, and reversing and remanding in part, due to "triable issues of fact" was final where party bearing burden of proof presented no evidence and its reliance on inconsistencies in opponent's evidence was insufficient to raise genuine issues of material fact. *See Franchise Tax Bd. v. MacFarlane (In re MacFarlane)*, 83 F.3d 1041 (9th Cir. 1996), *abrogated on other grounds by Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15 (2000).

- Where district court reversed and remanded, court of appeals had jurisdiction to review legal question whether tax liens could be avoided on property not within bankruptcy estate where remand concerned primarily factual issues of allocating amount and extent of tax liens. *See DeMarah v. United States (In re DeMarah)*, 62 F.3d 1248, 1250 (9th Cir. 1995).

- BAP decision reversing dismissal of nondischargeability proceeding, and remanding for determination on merits, was final because appeal of legal question could obviate need for further factual proceedings. *See Dominguez v. Miller (In re Dominguez)*, 51 F.3d 1502, 1506-07 (9th Cir. 1995).

- BAP order reversing dismissal of adversary proceedings was final where bankruptcy court had ruled that adversary defendants were entitled as a matter of law to an offset equal to the entire amount of adversary plaintiff's settlement with another party, and further proceedings on remand would be unrelated to the district court's

decision. *See* *Sims v. DeArmond (In re Lendvest Mortgage, Inc.)*, 42 F.3d 1181, 1183 (9th Cir. 1994).

- District court remand order was appealable because, although the remand was for further factual findings on the central issue of equitable tolling of bankruptcy's statute of limitations, the issue was legal in nature and its resolution could dispose of the case and obviate the need for factfinding. *See* *Ernst & Young v. Matsumoto (In re United Ins. Mgmt., Inc.)*, 14 F.3d 1380, 1383-84 (9th Cir. 1994).

- District court order reversing a grant of relief from the automatic stay, and remanding for consideration of debtor's proposed reorganization plan, was final where existence of "new value doctrine" was a central legal question that could end proceedings. *See* *Bonner Mall P'ship v. U.S. Bancorp Mortgage Co. (In re Bonner Mall P'ship)*, 2 F.3d 899, 903-05 (9th Cir. 1993), *dismissed as moot*, 513 U.S. 18, 28-29 (1994) (declining to vacate Ninth Circuit's judgment).

- District court order reversing confirmation of a reorganization plan, setting new "cramdown" interest rate, and remanding for a determination whether the plan remained feasible under the new rate was reviewable by court of appeals. *See* *Farm Credit Bank v. Fowler (In re Fowler)*, 903 F.2d 694, 695-96 (9th Cir. 1990). *But cf.* *id.* at 696 n.3 (leaving open question whether court of appeals could review reversal of reorganization plan confirmation based on faulty interest rate where, on remand, district court or BAP did not set new discount rate).

- BAP's reversal of the dismissal of a Chapter 7 petition was reviewable because issues to be considered by bankruptcy court on remand were predominately legal and the underlying facts were not disputed. *See* *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 911 (9th Cir. 1988).

- District court order reversing bankruptcy court's dismissal for failure to state a claim and lack of standing was reviewable because appeal presented purely legal issues, remand was not for purposes of factual development, and no factual issues were pending that would impede

review. *See* *Crevier v. Welfare & Pension Fund for Local 701 (In re Crevier)*, 820 F.2d 1553, 1555 (9th Cir. 1987).

- District court order vacating a reorganization plan, and remanding for estimation of value of new claim and reconsideration of plan's feasibility in light of estimated value of new claim, was reviewable by the court of appeals. *See* *Pizza of Haw., Inc. v. Shakey's, Inc. (In re Pizza of Haw., Inc.)*, 761 F.2d 1374, 1378 (9th Cir. 1985).

- The BAP's decision voiding a trustee's sale of leaseholds originally held by debtor was final under prior statute and appealable by trustee under *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-54 (1964), even though decision left unresolved a dispute between lessor and trustee that apparently concerned the adequacy of notice to lessor. *See* *Sulmeyer v. Karbach Enters. (In re Exennium, Inc.)*, 715 F.2d 1401, 1402-03 & n.1 (9th Cir. 1983).

- The court of appeals has jurisdiction over the BAP's decision reversing and remanding a bankruptcy court order dismissing a debtor's Chapter 7 case when the United States Trustee timely files its notice of appeal of the BAP's decision to the court of appeals. *Neary v. Padilla (In re Padilla)*, 222 F.3d 1184, 1190 (9th Cir. 2000).

(d) Examples of Nonfinal BAP and District Court Remand Decisions

The following BAP and district court appellate decisions were held non-final and nonappealable:

- District court order remanding for determination of certain debtors' entitlement to damages and attorney's fees based on IRS's alleged violation of automatic stay was not final order. *See* *Walthall v. United States*, 131 F.3d 1289, 1293 (9th Cir. 1997).

- District court order reversing bankruptcy court's decision on claims by certain debtors was not final where district court also remanded for bankruptcy court to consider its jurisdiction over substance of

decision, even though appeal might have obviated need for a remand. *See* *Walthall v. United States*, 131 F.3d 1289, 1293-94 (9th Cir. 1997) (citing potential for piecemeal litigation and absence of irreparable harm).

- District court's reversal of bankruptcy court's denial of attorney's fees was not a final order where district court also remanded for factual determination of whether other factors may preclude fee award. *See* *Stanley v. Crossland, Crossland, Chambers, MacArthur & Lastreto (In re Lakeshore Vill. Resort, Ltd.)*, 81 F.3d 103, 107-08 (9th Cir. 1996).

- District court's order vacating bankruptcy court's judgment in adversary proceeding, and remanding for proposed findings of fact and conclusions of law pursuant to 28 U.S.C. § 157(c)(1), was not a final order. *See* *Vylene Enters. v. Naugles, Inc. (In re Vylene Enters.)*, 968 F.2d 887, 894-97 (9th Cir. 1992).

- BAP's decision affirming bankruptcy court's decision on adversary plaintiff's claims, but reversing dismissal of adversary defendant's counterclaims and remanding for consideration of the latter, was not a final order. *See* *King v. Stanton (In re Stanton)*, 766 F.2d 1283, 1286-88 & n.8 (9th Cir. 1985).

- BAP's affirmance of bankruptcy court's order subordinating creditor's lien to homestead exemptions prior to a forced sale was not final where BAP also vacated and remanded for additional factfinding regarding a central issue, i.e., debtors' interests in the homestead. *See* *Dental Capital Leasing Corp. v. Martinez (In re Martinez)*, 721 F.2d 262, 264-65 (9th Cir. 1983).

iv. Finality of Other BAP and District Court Orders

(a) Order Denying Permission to Appeal Non-Final Bankruptcy Court Order

A district court's order denying permission to appeal an interlocutory bankruptcy court order is not itself appealable. *See Ryther v. Lumber Prods., Inc.*

(In re Ryther), 799 F.2d 1412, 1414-15 (9th Cir. 1986); *see also* *Rains v. Flinn (In re Rains)*, 428 F.3d 893, 900-01 (9th Cir. 2005).

(b) Order Denying Stay Pending Appeal from Bankruptcy Court Order

A district court's order denying a stay pending appeal of a bankruptcy court's order is not final. *See* *Teleport Oil Co. v. Sec. Pac. Nat'l Bank (In re Teleport Oil Co.)*, 759 F.2d 1376, 1377-78 (9th Cir. 1985) (holding that § 158 precludes bankruptcy appellants from relying on 28 U.S.C. § 1292 for appellate review of a district court's denial of a stay of bankruptcy proceedings), *impliedly overruled on related grounds by* *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (holding that interlocutory appeals under 28 U.S.C. § 1292 may be taken from decisions of district courts reviewing bankruptcy courts decisions).

> *Cross-reference*: VI.B. 1.c.i (regarding appealability of district court bankruptcy decisions under 28 U.S.C. § 1292).

v. Determining Finality of Underlying Bankruptcy Court Order

(a) Generally

The jurisdiction of the court of appeals depends in part on whether the underlying bankruptcy court order was final. *See* *Rains v. Flinn (In re Rains)*, 428 F.3d 893, 900-01 (9th Cir. 2005); *Universal Life Church, Inc. v. United States (In re Universal Life Church, Inc.)*, 128 F.3d 1294, 1300 (9th Cir. 1997); *see also* *Greene v. United States (In re Souza)*, 795 F.2d 855, 857 (9th Cir. 1986) (stating that the court of appeals' "jurisdiction can only be based on a proper exercise of jurisdiction in the court below") (internal quotation marks and citation omitted); *Christian Life Ctr. Litig. Def. Comm. v. Silva (In re Christian Life Ctr.)*, 821 F.2d 1370, 1372-73 (9th Cir. 1987) (observing that the parties' and lower appellate court's treatment of bankruptcy court orders as interlocutory is not conclusive and exercising jurisdiction despite prior treatment of bankruptcy court order as interlocutory).

Three types of bankruptcy court decisions are appealable to the BAP or district court: (1) "final judgments, orders, and decrees," (2) interlocutory orders issued under 11 U.S.C. § 1121(d) increasing or decreasing the time periods within which a debtor may file and seek approval of a reorganization plan; and (3) upon leave of the BAP or district court, other interlocutory orders and decrees. 28 U.S.C. § 158(a) (listing orders appealable to district court); *see also id.* § 158(c)(1) (providing for BAP jurisdiction over same subject matter).

Generally, appeals to the Ninth Circuit first reach the BAP or district courts under 28 U.S.C. § 158(a)(1), discussed below.

(b) Determining Finality under 28 U.S.C. § 158(a)(1)

The primary finality standard under § 158(d) has been summarized as follows:

> Those orders that may determine and seriously affect substantive rights and cause irreparable harm to the losing party if it had to wait to the end of the bankruptcy case are immediately appealable, so long as the orders finally determine the discrete issue to which they are addressed. . . . [W]hen further proceedings in the bankruptcy court will affect the scope of the order, [however,] the order is not subject to review in this court under § 158.

Farber v. 405 N. Bedford Drive Corp. (In re 405 N. Bedford Drive Corp.), 778 F.2d 1374, 1377 (9th Cir. 1985) (internal quotations and citations omitted); *accord Dye v. Brown (In re AFI Holding, Inc.)*, 530 F.3d 832, 836 (9th Cir. 2008) (order); *Law Offices of Nicholas A. Franke v. Tiffany (In re Lewis)*, 113 F.3d 1040, 1043 (9th Cir. 1997); *see also Foothill Capital Corp. v. Clare's Food Mkt., Inc. (In re Coupon Clearing Serv., Inc.)*, 113 F.3d 1091, 1097-98 (9th Cir. 1997) ("[C]ertain proceedings in a bankruptcy case are so distinctive and conclusive either to the rights of the individuals or the ultimate outcome of the case that final decisions as to them should be appealable as of right."); *cf. United States v. Fowler (In re Fowler)*, 394 F.3d 1208, 1211 (9th Cir. 2005) (observing two separate tests for determining finality but declining to decide).

In considering the finality of a bankruptcy court decision, the focus is on the proceeding immediately before the court rather than on the overall bankruptcy case. *See* *Brown v. Wilshire Credit Corp. (In re Brown)*, 484 F.3d 1116, 1120 (9th Cir. 2007) ("A disposition is final if it contains a complete act of adjudication, that is, a full adjudication of the issues at bar, and clearly evidences the judge's intention that it be the court's final act in the matter.") (quotations omitted); *Slimick v. Silva (In re Slimick)*, 928 F.2d 304, 307 n.1 (9th Cir. 1990) ("[I]n bankruptcy, a complete act of adjudication need not end the entire case, but need only end any of the interim disputes from which appeal would lie."). The bankruptcy court must intend that its order be final. *See* *Slimick*, 928 F.2d at 307-08.

Orders affecting important property rights are final where, without an immediate appeal, those with interests in the property might suffer "irreparable harm." *See* *Lyons v. Lyons (In re Lyons)*, 995 F.2d 923, 924 (9th Cir. 1993) (referring to district court decision on appeal but necessarily meaning original bankruptcy court order); *see also* *Burchinal v. Cent. Wash. Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484, 1487 (9th Cir. 1987) (order final because it "disposes of [the] property rights" of individuals); *Cannon v. Hawaii Corp. (In re Hawaii Corp.)*, 796 F.2d 1139, 1142-43 (9th Cir. 1986) (determining that district court's order was final under *Forgay-Conrad* rule because it "require[d] the immediate turnover of property and subject[ed] the party to irreparable harm if the party is forced to wait until the final outcome of the litigation").

(c) Examples of Final Bankruptcy Court Decisions

The following bankruptcy court decisions have been held final and appealable:

(1) Assumption of Lease (Approval)

Orders approving the assumption of leases are final. *See* *Willamette Waterfront, Ltd. v. Victoria Station Inc. (In re Victoria Station Inc.)*, 875 F.2d 1380, 1382 (9th Cir. 1989); *Caravansary, Inc. v. Passanisi (In re Caravansary, Inc.)*, 821 F.2d 1413, 1414 n.1 (9th Cir. 1987).

(2) Assumption of Lease (Denial)

Orders denying debtors' motions to assume leases are final. *See* *Turgeon v. Victoria Station Inc. (In re Victoria Station Inc.)*, 840 F.2d 682, 683-84 (9th Cir. 1988); *see also* *Arizona Appetito's Stores, Inc. v. Paradise Vill. Inv. Co. (In re Arizona Appetito's Stores, Inc.)*, 893 F.2d 216, 218 (9th Cir. 1990).

(3) Automatic Stay

Orders granting or denying relief from, or enforcing, the automatic stay are final. *See* *Benedor Corp. v. Conejo Enters. (In re Conejo Enters.)*, 96 F.3d 346, 351 (9th Cir. 1996) (order granting relief); *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162, 1165-66 (9th Cir. 1990) (order reimposing automatic stay as to selected features of particular state court litigation); *Stringer v. Huet (In re Stringer)*, 847 F.2d 549, 550 (9th Cir. 1988) (order denying motion to have state court judgment declared void as an automatic stay violation).

(4) Cash Collateral

Orders declaring rent proceeds not to be cash collateral under 11 U.S.C. § 363(a) are final. *See* *Wattson Pac. Ventures v. Valley Fed. Sav. & Loan (In re Safeguard Self-Storage Trust)*, 2 F.3d 967, 969 (9th Cir. 1993).

(5) Contempt

Civil contempt orders imprisoning individuals are final. *See* *Plastiras v. Idell (In re Sequoia Auto Brokers, Ltd.)*, 827 F.2d 1281, 1283 (9th Cir. 1987) (noting that affected individual was not a party to the particular bankruptcy case, although he was a debtor himself, and that basis of contempt was individual's invocation of Fifth Amendment), *superseded by statute on other grounds as stated in* *Caldwell v. United Capitol Corp. (In re Rainbow Magazine)*, 77 F.3d 278 (9th Cir. 1996).

(6) Deficiency Judgment

Decisions in actions to recover deficiencies following foreclosures are final. *See* *FDIC v. Jenson (In re Jenson)*, 980 F.2d 1254, 1257 (9th Cir. 1992).

(7) Dismissal of Bankruptcy Petition

Dismissals of bankruptcy petitions are final. *See* Zolg v. Kelly (In re Kelly), 841 F.2d 908, 911 (9th Cir. 1988) (Chapter 7 petition); *Miyao v. Kuntz (In re Sweet Transfer & Storage, Inc.)*, 896 F.2d 1189, 1191 (9th Cir. 1990) (involuntary petition), *superseded by rule as stated in Arrowhead Estates Dev. v. Jarrett*, 42 F.3d 1306 (9th Cir. 1994).

(8) Dismissal of Creditor's Claim

Dismissals of creditors' claims are final. *Dominguez v. Miller (In re Dominguez)*, 51 F.3d 1502, 1505-06 (9th Cir. 1995) (order dismissing creditors' action seeking declaration of nondischargeability); *Sambo's Rests., Inc. v. Wheeler (In re Sambo's Rests., Inc.)*, 754 F.2d 811, 813 (9th Cir. 1985) (order denying motion to amend purported informal proof of claim); *see also Dunkley v. Rega Props., Ltd. (In re Rega Props., Ltd.)*, 894 F.2d 1136, 1139 (9th Cir. 1990) (reviewing bankruptcy court's determination of measure of damages resulting from rejection of real estate contract which disposed of creditor's claim).

(9) Exemptions

Orders regarding homestead exemptions are final. *Seror v. Kahan (In re Kahan)*, 28 F.3d 79, 80-81 (9th Cir. 1994) (order sustaining trustee's objection to debtor's amended schedule revising claimed exemption); *White v. White (In re White)*, 727 F.2d 884, 885-86 (9th Cir. 1984) (order approving homestead exemption and confirming reorganization plan).

A bankruptcy court's order denying a claim of exemption is a final, appealable order. *Preblich v. Battley*, 181 F.3d 1048, 1056 (9th Cir. 1999).

(10) Fee Application (Approval)

Orders on fee applications submitted by debtors' attorneys are final where attorneys have been discharged and bankruptcy court's comments did not leave open possibility that additional fees would be granted, despite court's reference to future applications. *See Yermakov. v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1469 (9th Cir. 1983) (applying former § 1293(b)).

(11) Fee Application (Denial)

Orders denying fee applications submitted by firms representing trustees are final. *See* *Stanley v. Crossland, Crossland, Chambers, MacArthur & Lastreto (In re Lakeshore Vill. Resort, Ltd.)*, 81 F.3d 103, 105 (9th Cir. 1996).

(12) Fee Disgorgement

Orders that attorneys for debtors disgorge certain fees, even though disposition of fees not yet decided, are final provided that debtor's attorney only challenged the bankruptcy court's order to disgorge funds and not how the funds would be disposed. *See* *Law Offices of Nicholas A. Franke v. Tiffany (In re Lewis)*, 113 F.3d 1040, 1043-44 (9th Cir. 1997).

(13) Injunction

Order granting preliminary injunction staying arbitration proceedings between two non-bankrupt parties was final. *See* *Solidus Networks, Inc. v. Excel Innovations, Inc. (In re Excel Innovations)*, 502 F.3d 1086, 1092-93 (9th Cir. 2007).

(14) Loan Authorization

Orders authorizing debtors to enter loan contracts that subordinate claims of other creditors are final. *See* *Burchinal v. Cent. Wash. Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484, 1487 (9th Cir. 1987).

(15) Order for Relief

Orders for relief are final. *See* *Rubin v. Belo Broad. Corp. (In re Rubin)*, 769 F.2d 611, 615 (9th Cir. 1985) (order striking debtor's answer to involuntary petition and entering an order for relief); *cf.* *Mason v. Integrity Ins. Co. (In re Mason)*, 709 F.2d 1313, 1315-18 (9th Cir. 1983) (denial of motion to vacate order for relief is final).

(16) Priority of Liens

Orders establishing priority of liens or subordinating debts are final. *See* *United States v. Stone (In re Stone)*, 6 F.3d 581, 582-83 & n.1 (9th Cir. 1993)

(federal tax liens); *Christian Life Ctr. Litig. Def. Comm. v. Silva (In re Christian Life Ctr.)*, 821 F.2d 1370, 1373 (9th Cir. 1987) (treating as final district court's appellate decision that disallowed a claim for administrative expenses and subordinated a claim to general creditors); *La Grand Steel Prods. Co. v. Goldberg (In re Poole, McGonigle & Dick, Inc.)*, 796 F.2d 318, 320-21 (9th Cir. 1986) (district court order that subordinated debts and confirmed a reorganization plan was final), *amended by* 804 F.2d 576 (9th Cir. 1986).

(17) Removal of Bankruptcy Trustee

Orders removing a bankruptcy trustee are final. *Dye v. Brown (In re AFI Holding, Inc.)*, 530 F.3d 832, 837 (9th Cir. 2008) (order).

(18) Reorganization Plan (Confirmation)

Orders confirming reorganization plans are final. *See Farm Credit Bank v. Fowler (In re Fowler)*, 903 F.2d 694, 695 (9th Cir. 1990) (Chapter 12 plan); *Pizza of Haw., Inc. v. Shakey's, Inc. (In re Pizza of Haw., Inc.)*, 761 F.2d 1374, 1378 (9th Cir. 1985); *cf. Chinichian v. Campolongo (In re Chinichian)*, 784 F.2d 1440, 1444 (9th Cir. 1986) (bankruptcy court's partial or tentative confirmation of a reorganization plan not final for res judicata purposes).

(19) Secured Status Order

A secured status order is final. *See Wiersma v. Bank of the West (In re Wiersma)*, 483 F.3d 933, 938-39 (9th Cir. 2007).

(20) Subordination of Debts

See VI.B.1.b.v (Priority of Liens).

(21) Summary Judgment on All Claims

Summary judgments granted on all claims are final. *See Foothill Capital Corp. v. Clare's Food Mkt., Inc. (In re Coupon Clearing Serv., Inc.)*, 113 F.3d 1091, 1097-98 (9th Cir. 1997); *see also Ernst & Young v. Matsumoto (In re United*

Ins. Mgmt., Inc.), 14 F.3d 1380, 1383-84 (9th Cir. 1994) (bankruptcy court's grant of partial summary judgment was final where court also abstained from deciding state law claims because the order effectively ended the case in bankruptcy court).

(22) Summary Judgment on Less Than All Claims

Certain partial summary judgments are final even without certification under Fed. R. Bankr. P. 7054 (which incorporates Fed. R. Civ. P. 54(b)). *See* *Century Ctr. Partners Ltd. v. FDIC (In re Century Ctr. Partners Ltd.)*, 969 F.2d 835, 838 (9th Cir. 1992) (bankruptcy court's partial grant of summary judgment appealable where decided claims were "entirely distinct" from remaining claims and were "conclusive" in some sense); *Fireman's Fund Ins. Cos. v. Grover (In re Woodson Co.)*, 813 F.2d 266, 269-70 (9th Cir. 1987) (bankruptcy court order granting partial summary judgment concerning permanent investors' rights in secured loans was appealable even though claims of revolving investors' rights in loans unresolved because order determined rights of distinct group and cast shadow over further administration of estate). *But cf.* VI.B.1.b.v.(e) (discussing applicability of bankruptcy equivalent of Fed. R. Civ. P. 54(b)).

(23) Tax Payment

Orders permitting debtors to designate allocation of tax payments are final. *See* *United States v. Technical Knockout Graphics, Inc. (In re Technical Knockout Graphics, Inc.)*, 833 F.2d 797, 800-01 (9th Cir. 1987).

(24) Trustee's Authority

Orders rejecting challenges to ability of trustees to proceed by motion (rather than adversary proceeding) to establish right to sell property in which third parties and debtors both have interests are final. *See* *Lyons v. Lyons (In re Lyons)*, 995 F.2d 923, 924 (9th Cir. 1993).

A bankruptcy court order that approved the assignment of the Chapter 7 trustees' powers to sue various parties and to avoid certain transactions was a final, appealable decision, even though the bankruptcy court retained control over certain monetary matters if the assignee prevailed in the litigation or avoided the

transaction. *Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.)*, 177 F.3d 774, 780 (9th Cir. 1999).

(25) Vacatur of Order for Relief (Denial)

Orders denying vacatur of orders for relief are final. *See Mason v. Integrity Ins. Co. (In re Mason)*, 709 F.2d 1313, 1315-18 (9th Cir. 1983).

(26) Substantive Consolidation Order

A bankruptcy court's order consolidating debtor's estate with the nondebtor estates of her closely held corporations is final and appealable because such an order seriously affects the substantive rights of the involved parties, and is of the sort that can cause irreparable harm if the losing party must wait until the bankruptcy court proceedings terminate before appealing. *Alexander v. Compton (In re Bonham)*, 229 F.3d 750, 761-62 (9th Cir. 2000).

(27) Order Converting Bankruptcy Case to Chapter 7

A bankruptcy court's order converting a case under another chapter of the Bankruptcy Code, to one under Chapter 7 is final and appealable. *See Rosson v. Fitzgerald (In re Rosson)*, No. 06-73524, — F.3d —, 2008 WL 4330558 *3 (9th Cir. Sept. 24, 2008).

(d) Examples of Nonfinal Bankruptcy Court Decisions

The following bankruptcy court decisions have been held nonfinal and therefore nonappealable under 28 U.S.C. § 158(a)(1):

(1) Appointment of Counsel

Orders appointing counsel for trustees are not final. *See Sec. Pac. Nat'l Bank v. Steinberg (In re Westwood Shake & Shingle, Inc.)*, 971 F.2d 387, 389 (9th Cir. 1992) (noting also that orders involving appointment of counsel are uniformly

found interlocutory even in more flexible bankruptcy context). *But cf.* *Official Creditors' Comm. v. Metzger (In re Dominelli)*, 788 F.2d 584, 585-86 (9th Cir. 1986) (bankruptcy court's appointment of attorney for creditors' committee that raised possibility debtors' estates would be liable for attorney's fees was sufficiently "ripe for review on appeal").

(2) Damages Undecided

Decisions that trustees assumed contracts where damages from trustee's defaults remain undetermined are not final. *See* *Elliott v. Four Seasons Props. (In re Frontier Props., Inc.)*, 979 F.2d 1358, 1362-63 (9th Cir. 1992).

(3) Defaults

Orders granting debtors' motions to cure defaults under 11 U.S.C. § 1124 are not final. *See* *Farber v. 405 N. Bedford Drive Corp. (In re 405 N. Bedford Drive Corp.)*, 778 F.2d 1374, 1379-80 (9th Cir. 1985).

(4) Disclosure Statement (Approval)

Orders approving debtors' disclosure statements are not final. *See* *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1216-17 (9th Cir. 1994) (appeal must await confirmation of reorganization plan).

(5) Disclosure Statement (Rejection)

Orders denying approval of disclosure statements are not final. *See* *Lievsay v. W. Fin. Sav. Bank (In re Lievsay)*, 118 F.3d 661, 662-63 (9th Cir. 1997) (per curiam) (referring to bankruptcy court's decision denying approval of a second amended disclosure statement as the denial of confirmation of a "Chapter 11 plan").

(6) Dismissal of Bankruptcy Petition (Denial)

Orders denying motions to dismiss petitions are not final. *See* *Allen v. Old Nat'l Bank (In re Allen)*, 896 F.2d 416, 419 (9th Cir. 1990) (per curiam) (order

denying debtors' motion to dismiss involuntary petitions was not final where no substantial interference with debtors' property appeared); *Silver Sage Partners, Ltd. v. City of Desert Hot Springs (In re City of Desert Hot Springs)*, 339 F.3d 782, 792 (9th Cir. 2003); *Dunkley v. Rega Props., Ltd. (In re Rega Props., Ltd.)*, 894 F.2d 1136, 1137-39 (9th Cir. 1990) (order denying creditor's motion to dismiss for bad faith under 11 U.S.C. § 1112 not final); *Farber v. 405 N. Bedford Drive Corp. (In re 405 N. Bedford Drive Corp.)*, 778 F.2d 1374, 1377-79 (9th Cir. 1985) (order denying creditors' motion to dismiss not final); *see also Sherman v. SEC (In re Sherman)*, 491 F.3d 948, 967 n.24 (9th Cir. 2007).

(7) Disqualification (Denial)

Orders denying motions to disqualify bankruptcy judges are not final. *See Stewart Enters. v. Horton (In re Horton)*, 621 F.2d 968, 970 (9th Cir. 1980) (decided under prior bankruptcy statute); *see also Sec. Pac. Nat'l Bank v. Steinberg (In re Westwood Shake & Shingle, Inc.)*, 971 F.2d 387, 389 (9th Cir. 1992) (stating in dictum that orders involving disqualification of counsel are interlocutory even in bankruptcy context).

(8) Extension of Time

Orders granting extensions of time in which to file proofs of claims based on excusable neglect are not final. *See New Life Health Ctr. Co. v. IRS (In re New Life Health Ctr. Co.)*, 102 F.3d 428, 428-29 (9th Cir. 1996) (per curiam).

(9) Fee Terms and Interim Payments

Orders setting out manner in which special counsel to estates would be paid are not final. *See Four Seas Ctr., Ltd. v. Davres, Inc. (In re Four Seas Ctr., Ltd.)*, 754 F.2d 1416, 1417-19 (9th Cir. 1985) (decided under former bankruptcy statute); *cf. Landmark Hotel & Casino, Inc. v. Local Joint Executive Bd. (In re Landmark Hotel & Casino, Inc.)*, 872 F.2d 857, 860-61 (9th Cir. 1989) (analogizing to cases concerning appointment of interim trustees and award of interim compensation to find that orders providing interim relief pending ruling on motions to reject collective bargaining agreements are not final).

(10) Interim Relief

Orders providing interim relief under 11 U.S.C. § 1113(e) pending final ruling on debtor-employers' motions to reject collective bargaining agreements are not final. *See Landmark Hotel & Casino, Inc. v. Local Joint Executive Bd. (In re Landmark Hotel & Casino, Inc.)*, 872 F.2d 857, 860-61 (9th Cir. 1989).

(11) Minute Order

The court's entry of a minute order granting summary judgment was not a final order. *See Brown v. Wilshire Credit Corp. (In re Brown)*, 484 F.3d 1116, 1122-23 (9th Cir. 2007).

(12) Reorganization Plan (Rejection)

Orders denying confirmation of reorganization plans may not be final. *See Lievsay v. W. Fin. Sav. Bank (In re Lievsay)*, 118 F.3d 661, 662-63 (9th Cir. 1997) (per curiam) (referring to bankruptcy court's decision denying approval of a second amended disclosure statement as a denial of confirmation of a "Chapter 11 plan"); *cf. Chinichian v. Campolongo (In re Chinichian)*, 784 F.2d 1440, 1444 (9th Cir. 1986) (concluding that a partial or tentative confirmation of a reorganization plan was not final for res judicata purposes).

(e) Finality under Fed. R. Bankr. P. 7054 (Equivalent to Fed. R. Civ. P. 54(b))

Bankruptcy court decisions can also be rendered final through certification under Fed. R. Civ. P. 54(b), which applies to adversary proceedings via Fed. R. Bankr. P. 7054. *See Official Creditors Comm. v. Tuchinsky (In re Major Dynamics, Inc.)*, 897 F.2d 433, 435 (9th Cir. 1990) (bankruptcy court certified partial summary judgment for appeal under Fed. R. Bankr. P. 7054). The time period for appeal begins to run upon entry of the certification order. *See Lindsay v. Beneficial Reinsurance Co. (In re Lindsay)*, 59 F.3d 942, 951 (9th Cir. 1995) (order certified under Rule 54(b) not subject to review on appeal from final judgment).

> *Cross-reference*: II.A.3 (regarding orders certified for appeal under Fed. R. Civ. P. 54(b)).

c. Other Bases for Ninth Circuit Review

i. 28 U.S.C. § 1292

An interlocutory decision of a district court may be reviewable by the court of appeals under 28 U.S.C. § 1292 regardless of whether the district court exercised original or appellate bankruptcy jurisdiction. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *Vylene Enters. v. Naugles, Inc. (In re Vylene Enters.)*, 968 F.2d 887, 890 (9th Cir. 1992) (dictum); *see also Goodson v. Rowland (In re Pintlar Corp.)*, 133 F.3d 1141, 1143 (9th Cir. 1998) (court of appeals has jurisdiction under 28 U.S.C. § 1292(b) following district court's review of interlocutory bankruptcy court decision); *Postal v. Smith (In re Marine Distribs., Inc.)*, 522 F.2d 791, 793-94 (9th Cir. 1975) (court of appeals had jurisdiction under 28 U.S.C. § 1292(a)(1) to review district court's affirmance of preliminary injunction issued by bankruptcy referee).

Note that interlocutory appeals under 28 U.S.C. § 1292(b) are not available from BAP decisions. *See Lievsay v. W. Fin. Sav. Bank (In re Lievsay)*, 118 F.3d 661, 663 (9th Cir. 1997) (per curiam); *Dominguez v. Miller (In re Dominguez)*, 51 F.3d 1502, 1506 n.2 (9th Cir. 1995).

ii. Mandamus

Mandamus review is available in appropriate cases. *See Allen v. Old Nat'l Bank (In re Allen)*, 896 F.2d 416, 419-20 (9th Cir. 1990) (per curiam) (construing appeal from nonfinal bankruptcy court order affirmed by district court as petition for writ of mandamus and denying petition on its merits); *Teleport Oil Co. v. Sec. Pac. Nat'l Bank (In re Teleport Oil Co.)*, 759 F.2d 1376, 1378 (9th Cir. 1985) (recognizing that "mandamus jurisdiction is available to review a district court's denial of stay in those extraordinary cases where a bankruptcy appellant in the district court is threatened with irreparable harm and there are no other means, including the eventual appeal, to protect himself from this harm," but denying such relief because appellant had not shown threat of irreparable harm), *impliedly overruled on related grounds by Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

2. APPEALS FROM DECISIONS OF DISTRICT COURT EXERCISING ORIGINAL BANKRUPTCY JURISDICTION

Cross-reference: VI.A.2 (regarding determining whether a district court decided a case under its original or appellate bankruptcy jurisdiction).

a. Direct Appeal to the Ninth Circuit

In cases where a district court exercises its original bankruptcy jurisdiction (i.e., "sits in bankruptcy"), appeals are governed solely by 28 U.S.C. § 1291 and are therefore taken directly to the court of appeals. *See Harris v. McCauley (In re McCauley)*, 814 F.2d 1350, 1351 (9th Cir. 1987); *see also Benny v. England (In re Benny)*, 791 F.2d 712, 716-18 (9th Cir. 1986) (stating that appellate jurisdiction not conferred by 28 U.S.C. § 158(d)).

b. Standards for Finality

i. General Rule

More liberal standards for "finality" in appeals arising from bankruptcy courts (*see* VI.B.1.b.i) are generally not applicable in appeals arising from district courts exercising their original bankruptcy jurisdiction. *See Cannon v. Hawaii Corp. (In re Hawaii Corp.)*, 796 F.2d 1139, 1141-42 & n.1 (9th Cir. 1986).

Cross-reference: II.A (regarding finality of district court decisions in civil cases).

ii. "Special Exceptions"

Certain exceptions permitting appeals from otherwise interlocutory decisions by district courts sitting in bankruptcy have been recognized. *See Packerland Packing Co. v. Griffith Brokerage Co. (In re Kemble)*, 776 F.2d 802, 805 (9th Cir. 1985) (noting "special exceptions" to finality requirement of 28 U.S.C. § 1291, court holds it has jurisdiction to review decision of district court that granted relief from automatic stay).

iii. Collateral Order Doctrine & *Forgay-Conrad* Rule

The collateral order doctrine and the *Forgay-Conrad* rule may permit an appeal from an interlocutory order entered by a district court sitting in bankruptcy. *See* *Cannon v. Hawaii Corp. (In re Hawaii Corp.)*, 796 F.2d 1139, 1142-43 (9th Cir. 1986) (decision of district court sitting in bankruptcy final under collateral order doctrine and *Forgay-Conrad* rule because order required party to turn over property (i.e. shares of stocks) immediately, and party would suffer irreparable harm if appeal was unavailable until bankruptcy case concluded).

> *Cross-reference*: II.A.2 (regarding the collateral order doctrine generally); VI.B.1.b.v (regarding the rule first developed in *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848)).

c. Appealability of Specific Orders

i. Appealable District Court Decisions

The decision of a district court sitting in bankruptcy to grant relief from an automatic stay is final and appealable. *See* *Packerland Packing Co. v. Griffith Brokerage Co. (In re Kemble)*, 776 F.2d 802, 805 (9th Cir. 1985).

ii. Non-Appealable District Court Decisions

Decisions of district courts under 28 U.S.C. § 157(d) to withdraw or not to withdraw reference of cases to bankruptcy courts are not final and therefore not appealable by themselves. *See* *Abney v. Kissel Co. (In re Kissel Co.)*, 105 F.3d 1324, 1325 (9th Cir. 1997) (order) (dismissing appeal of district court's denial of motion to withdraw reference); *Packerland Packing Co. v. Griffith Brokerage Co. (In re Kemble)*, 776 F.2d 802, 805-06 (9th Cir. 1985) (concluding that orders granting withdrawal of reference are not final); *see also* *Canter v. Canter (In re Canter)*, 299 F.3d 1150, 1153 (9th Cir. 2002) (holding that the district court's sua sponte withdrawal of reference to the bankruptcy court is unreviewable, but ultimately treating the appeal as a petition for a writ of mandamus). *But cf.* *Sec. Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999, 1008 (9th Cir. 1997) (reviewing order withdrawing reference on appeal from final judgment).

Cross-reference: VI.E (regarding orders from which appeal is barred – certain decisions regarding remand to state court, abstention, dismissal or stay of bankruptcy proceedings, and appeals by certain entities).

d. Effect of Appeal on District Court Jurisdiction

A district court sitting in bankruptcy lacks jurisdiction to modify or vacate an order that is on appeal. *See* *Bennett v. Gemmill (In re Combined Metals Reduction Co.)*, 557 F.2d 179, 200-01 (9th Cir. 1977). Before a district court can entertain a Rule 60(b) motion, the court must indicate its intention to do so, and the movant must then seek a remand from the court of appeals. *See* *Crateo, Inc. v. Intermark, Inc. (In re Crateo, Inc.)*, 536 F.2d 862, 869 (9th Cir. 1976), *superseded by rule as stated in* *Miller v. Marriott Int'l, Inc.*, 300 F.3d 1061, 1065 (9th Cir. 2002).

C. TIMELINESS OF BANKRUPTCY APPEALS

1. APPEAL FROM DECISION OF BAP OR DISTRICT COURT ACTING IN APPELLATE CAPACITY

Different rules govern the timeliness of an appeal from a bankruptcy court decision depending on whether an appeal is (a) to the Ninth Circuit from a decision of the BAP or a district court exercising appellate jurisdiction over the bankruptcy court or (b) from the original bankruptcy court decision to the BAP or district court.

The Ninth Circuit's jurisdiction depends on timely appeals at both levels of review. *See, e.g.*, *Saslow v. Andrew (In re Loretto Winery Ltd.)*, 898 F.2d 715, 717 (9th Cir. 1990) (stating that timely appeal from the BAP to court of appeals is a jurisdictional requirement); *Greene v. United States (In re Souza)*, 795 F.2d 855, 857 (9th Cir. 1986) (stating that court of appeals lacks jurisdiction over untimely appeal to a district court from a bankruptcy court's order).

a. Generally

Under Fed. R. App. P. 6(b)(1), appeals from either the BAP or the district court exercising appellate bankruptcy jurisdiction are generally governed by the

Federal Rules of Appellate Procedure. *See* *Reilly v. Hussey*, 989 F.2d 1074, 1076 (9th Cir. 1993). Where necessary, references in the appellate rules to "district court" mean the BAP. *See* Fed. R. App. P. 6(b)(1)(C).

Cross-reference: III.A (regarding application of Fed. R. App. P. 4(a) in civil cases generally); VI.C.1.e (regarding timeliness of appeals from bankruptcy court to the BAP or district court).

b. Time to Appeal BAP or District Court Appellate Decision

i. Basic Time Period

The time period for appeal from either a BAP decision or a district court appellate decision is 30 days unless the United States or an officer or agency thereof is a party, in which case it is 60 days. Fed. R. App. P. 4(a)(1); *see, e.g.*, *Saslow v. Andrew (In re Loretto Winery Ltd.)*, 898 F.2d 715, 717 (9th Cir. 1990) (notice of appeal from BAP decision untimely where filed beyond 30-day period specified in Fed. R. App. P. 4(a)). The timing of cross-appeals is governed by Fed. R. App. P. 4(a)(3).

As with other cases, the time periods under Rule 4 are mandatory and jurisdictional in bankruptcy cases. *See* *Saslow*, 898 F.2d at 717.

ii. United States as a Party to a Bankruptcy Case

For purposes of Fed. R. App. P. 4(a), the United States or an officer or agency thereof is a party to a bankruptcy appeal only if it "is a participant in the particular controversy which led to the appeal," and no statute prohibits the government from filing an appeal in the matter. *Bennett v. Gemmill (In re Combined Metals Reduction Co.)*, 557 F.2d 179, 204 (9th Cir. 1977).

A court-appointed private bankruptcy trustee is not an officer of the United States for purposes of Fed. R. App. P. 4(a)(1), and the U.S. Trustee is not a party for purposes of the 60-day appeal period if the trustee only appears in court to quash improper service. *See* *Voisenat v. Decker (In re Serrato)*, 117 F.3d 427, 428-29 (9th Cir. 1997).

Where the United States is a party to one of the several bankruptcy appeals informally consolidated by the district court, the 60-day period under Fed. R. App. P. 4(a)(1) applies to all cases. *See Burchinal v. Cent. Wash. Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484, 1487 (9th Cir. 1987) (stating that Fed. R. App. P. 4(a)(3), providing 14 days to file additional notices of appeal following timely filing of first notice, also applies).

iii. "Filing" of Notice of Appeal

In accordance with Fed. R. Bankr. P. 8008(a), a notice of appeal may be filed with the BAP or district court acting in its appellate capacity "by mail addressed to the clerk, but filing is not timely unless the papers are received by the clerk within the time fixed for filing, except that briefs are deemed filed on the day of mailing." Fed. R. Bankr. P. 8008(a).

iv. Commencement of Time Period

Fed. R. Bankr. P. 8016(a), analogous to Fed. R. Civ. P. 58, provides for entry of judgment by the BAP or district court in an appeal from a bankruptcy court.

v. Computation of Appeal Deadline

Regarding computation of the deadline for appeal under Fed. R. App. P. 26, *see* III.A.4.

c. Extensions of Time to Appeal

Extensions of time in which to appeal are governed by Fed. R. App. P. 4(a)(5), (6). *See* Fed. R. App. P. 6(b)(1).

> *Cross-reference*: III.D (regarding extensions of time to appeal under Fed. R. App. P. 4(a) in civil cases generally); VI.C.1.e.vi (regarding extensions of time to appeal from bankruptcy court to the BAP or district court).

d. Tolling Motions

i. Motion for Rehearing

The provisions of Fed. R. App. P. 4(a)(4) regarding tolling the time to appeal do not apply to appeals from the BAP or the district court acting in an appellate bankruptcy capacity. *See* Fed. R. App. P. 6(b)(1)(A). In such appeals, only the timely filing of a motion for rehearing tolls the time to appeal. *See* Fed. R. App. P. 6(b)(2)(A); Fed. R. Bankr. P. 8015; *see also* *Theodore v. Daglas (In re D.W.G.K. Rests., Inc.)*, 42 F.3d 568, 569-70 (9th Cir. 1994) (dismissing appeal because untimely motion for rehearing of decision by district court acting in appellate bankruptcy capacity did not toll time in which to appeal).

ii. Time in Which to File Motion

To toll the time to appeal from the BAP or district court, Fed. R. Bankr. P. 8015 normally requires the motion for rehearing to be filed within 10 days after entry of the judgment of the district court or the bankruptcy appellate panel. By its terms, Fed. R. Bankr. P. 8015 also permits the BAP or district court to alter the usual 10-day period either by local rule or court order. However, neither confusion about filing deadlines nor informal indications from the district court suggesting a possible extension of time in which to file a motion for rehearing are sufficient to extend the 10-day limit. *See* *Theodore v. Daglas (In re D.W.G.K. Rests., Inc.)*, 42 F.3d 568, 569-70 (9th Cir. 1994).

iii. Restarting Time to Appeal

The time to appeal from an order deciding a timely motion for rehearing runs from entry of the order and is measured under the usual provisions of Fed. R. App. P. 4. *See* Fed. R. App. P. 6(b)(2)(A); *see also* Fed. R. Bankr. P. 8015.

iv. Need for New or Amended Notice of Appeal

A notice of appeal filed during the pendency of a timely motion for rehearing "becomes effective when the order disposing of the motion for rehearing is entered." Fed. R. App. P. 6(b)(2)(A)(i). Following entry of the dispositive

order, it is necessary to amend any previously filed notice of appeal to bring up on appeal any order altering the original decision. *See* Fed. R. App. P. 6(b)(2)(A)(ii).

e. Determining Timeliness of Underlying Appeal from Bankruptcy Court to BAP or District Court

i. Generally

"If the district court did not have jurisdiction to review the merits, then this court does not have jurisdiction to consider the merits on appeal." *Greene v. United States (In re Souza)*, 795 F.2d 855, 857 (9th Cir. 1986) (citation omitted). The court of appeals must consider the jurisdictional issue sua sponte and regardless of whether it was raised below. *See id.* at 857 n.1; *LaFortune v. Naval Weapons Ctr. Fed. Credit Union (In re LaFortune)*, 652 F.2d 842, 844 (9th Cir. 1981).

> *Cross-reference*: VI.C.1 (regarding timeliness of appeals from the BAP, or district court exercising appellate bankruptcy jurisdiction, to the Ninth Circuit).

ii. Time Period for Filing Appeal

Under Fed. R. Bankr. P. 8002(a), a bankruptcy court order must be appealed within ten days. *Accord* 28 U.S.C. § 158(c)(2); *see also Wiersma v. Bank of the West (In re Wiersma)*, 483 F.3d 933, 938 (9th Cir. 2007) (reversing BAP's holding that it retained jurisdiction over appeal where notice of appeal filed after ten days); *Saunders v. Band Plus Mortgage Corp. (In re Saunders)*, 31 F.3d 767, 767 (9th Cir. 1994) (per curiam) (affirming BAP's dismissal of appeal filed 12 days after bankruptcy court entered order); *Delaney v. Alexander (In re Delaney)*, 29 F.3d 516, 518 (9th Cir. 1994) (per curiam) (district court lacked jurisdiction over appeal from notice of appeal filed 13 days after bankruptcy court judgment); *cf. Brown v. Wilshire Credit Corp. (In re Brown)*, 484 F.3d 1116, 1120-1122 (9th Cir. 2007) (holding minute order not final order; thus, court not deprived of jurisdiction when notice of appeal filed more than ten days after minute order).

The calculation of deadlines for filing an appeal is governed by Fed. R. Bankr. P. 9006. *See* *United States v. Schimmels (In re Schimmels)*, 85 F.3d 416, 420 (9th Cir. 1996).

iii. Procedure for Filing Notice

Procedures for filing papers with the bankruptcy court are set out in Fed. R. Bankr. P. 5005. *See also* Fed. R. Bankr. P. 8002(a) (covering notices of appeal mistakenly filed with the BAP or district court).

iv. Entry of Judgment

"Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document." Fed. R. Bankr. P. 9021; *accord* *United States v. Schimmels (In re Schimmels)*, 85 F.3d 416, 420 (9th Cir. 1996); *see also* Fed. R. Bankr. P. 9001(7) ("Judgment means any appealable order."). Entry of "a short order that clearly constitutes a final decision," is sufficient to begin the time period for appeal. *United States v. Schimmels (In re Schimmels)*, 85 F.3d 416, 421 (9th Cir. 1996) (stating that despite the general requirement, a separate judgment is only necessary to start running the time in which to appeal "where it is uncertain whether a final judgment has been entered") (citation omitted); *see also* *Wiersma v. Bank of the West (In re Wiersma)*, 483 F.3d 933, 938-39 (9th Cir. 2007) (defining final order); *cf.* *Slimick v. Silva (In re Slimick)*, 928 F.2d 304, 307 (9th Cir. 1990) (affirming BAP's dismissal of appeal because absence of findings and conclusions did not undermine finality of bankruptcy court order that "obviously and necessarily" decided claim).

However, even though the time period for appeal does not begin to run until separate judgment is entered, appellate courts "may rule on the merits of the appeal without waiting for the bankruptcy court clerk to enter a separate judgment." *Allustiarte v. Hauser (In re Allustiarte)*, 848 F.2d 116, 117 (9th Cir. 1988) (per curiam).

v. Effect of Notice Filed Before Entry of Judgment

"A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree shall be treated as filed after such

entry and on the day thereof." Fed. R. Bankr. P. 8002(a). However, a notice of appeal filed before the announcement of an appealable order is ineffective to appeal from a subsequent final order. *See* *Landmark Hotel & Casino, Inc. v. Local Joint Executive Bd. (In re Landmark Hotel & Casino, Inc.)*, 872 F.2d 857, 861-62 (9th Cir. 1989).

vi. Extension of Time to Appeal

Except as to appeals from certain specified orders, the time in which to file a notice of appeal in the bankruptcy court may be extended upon a written motion filed before expiration of the initial appeal period. *See* Fed. R. Bankr. P. 8002(c). An extension may also be granted "upon a showing of excusable neglect" if the written motion is filed "not later than 20 days after the expiration of the time for filing a notice of appeal." Fed. R. Bankr. P. 8002(c)(2).

> *Cross-reference*: III.E (regarding the excusable neglect standard).

"An extension of time for filing a notice of appeal may not exceed 20 days from the expiration of the time for filing a notice of appeal otherwise prescribed by this rule or 10 days from the date of entry of the order granting the motion, whichever is later." Fed. R. Bankr. P. 8002(c)(2).

vii. Motions that Toll Time Period for Appeal

(a) Specific Tolling Motions

Fed. R. Bankr. P. 8002(b) enumerates specific motions that toll the time in which to appeal from a bankruptcy court decision. *See* Fed. R. Bankr. P. 8002(b). Certain other motions have been construed to toll the time for appeal. *See, e.g.*, *Bigelow v. Stoltenberg (In re Weston)*, 41 F.3d 493, 495 (9th Cir. 1995) (motion for reconsideration or rehearing); *United States v. Schimmels (In re Schimmels)*, 85 F.3d 416, 419 (9th Cir. 1996) (motion for reconsideration); *Juanarena v. Nicholson (In re Nicholson)*, 779 F.2d 514, 515-16 (9th Cir. 1985) (motion to reconsider bankruptcy court's decision filed within 10 days of decision on Rule 60 motion tolled time in which to appeal from latter decision).

(b) Restarting Time to Appeal

Under Fed. R. Bankr. P. 8002(a), a party has 10 days to appeal a bankruptcy court's order disposing of a tolling motion. *See United States v. Schimmels (In re Schimmels)*, 85 F.3d 416, 419-20 (9th Cir. 1996). A notice of appeal filed after announcement of the decision but before entry is effective as to both the original and new orders. *See Arrowhead Estates Dev. Co. v. United States Tr. (In re Arrowhead Estates Dev. Co.)*, 42 F.3d 1306, 1309-12 (9th Cir. 1994); *see also Rains v. Flinn (In re Rains)*, 428 F.3d 893, 899-900 (9th Cir. 2005).

(c) Need for New or Amended Notice of Appeal

A notice of appeal filed while a tolling motion is pending is "ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order" disposing of the last tolling motion. Fed. R. Bankr. P. 8002(b). The notice of appeal must then be amended to permit review of decision on the tolling motion. *See id.*

> *Cross-reference*: III.E (regarding the unique circumstances doctrine and excusable neglect standard).

2. APPEALS FROM DECISIONS OF DISTRICT COURT EXERCISING ORIGINAL BANKRUPTCY JURISDICTION

Appeals from "final judgment[s], order[s], or decree[s]" of district courts exercising original bankruptcy jurisdiction under 28 U.S.C. § 1334 are "taken as any other civil appeal under these rules." Fed. R. App. P. 6(a).

> *Cross-reference*: III (regarding timeliness of civil appeals generally).

D. SCOPE OF BANKRUPTCY APPEALS

1. MERGER OF INTERLOCUTORY RULINGS INTO FINAL JUDGMENT

a. General Rule

Interlocutory rulings of bankruptcy courts usually merge with, and are reviewable on appeal from, final judgments. *See* *Rains v. Flinn (In re Rains)*, 428 F.3d 893, 900-01 (9th Cir. 2005); *Sec. Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999, 1008 (9th Cir. 1997); *see also* *Elliott v. Four Seasons Props. (In re Frontier Props., Inc.)*, 979 F.2d 1358, 1364 (9th Cir. 1992) (failure to appeal interlocutory order will not preclude challenge to order on appeal from final order).

b. Rulings that Merge

The Ninth Circuit has reviewed the following interlocutory orders on appeal from final judgments:

- District court order approving a settlement, where the party appealed after court approval of the settlement but before final order was made, and where final order was made subsequent to the appeal. *See* *Rains v. Flinn (In re Rains)*, 428 F.3d 893, 900-01 (9th Cir. 2005).

- District court order withdrawing reference of case to bankruptcy court. *See* *Sec. Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999, 1008 (9th Cir. 1997). *But cf.* *Packerland Packing Co. v. Griffith Brokerage Co. (In re Kemble)*, 776 F.2d 802, 805-06 (9th Cir. 1985) (appeal from automatic stay order did not extend to order withdrawing case from bankruptcy court).

- Bankruptcy court's refusal to permit a creditor's withdrawal of proofs of claim without prejudice, where creditor subsequently withdrew the claims with prejudice after bankruptcy court provided creditor with no real alternative. *See* *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1399 (9th Cir. 1995).

- District court's refusal to vacate a writ of attachment obtained during deficiency action. *See* *FDIC v. Jenson (In re Jenson)*, 980 F.2d 1254, 1258 (9th Cir. 1992) (district court order merged with bankruptcy court's final judgment rendered after district court referred action to bankruptcy court).

- Order providing for "adequate protection" of undersecured creditor. *See* *Cimarron Investors v. Wyid Props. (In re Cimarron Investors)*, 848 F.2d 974, 975-76 (9th Cir. 1988) (appeal order lifting automatic stay to allow foreclosure where debtor ceased making "adequate protection" payments to undersecured creditor).

c. Rulings that Do Not Merge

Interlocutory decisions have not merged with final decisions in the following situations:

- Court of appeals would not consider issues concerning bank rent owed by former tenants on an appeal from bankruptcy court's order lifting a stay to allow foreclosure sale of property where appellant failed to raise issue on appeal to district court. *See* *Nat'l Mass Media Telecomm. Sys., Inc. v. Stanley (In re Nat'l Mass Media Telecomm. Sys., Inc.)*, 152 F.3d 1178, 1181 n.4 (9th Cir. 1998).

- Because an order imposing sanctions for a violation of the automatic stay is separately appealable, an untimely appeal from such an order precluded appellate jurisdiction, notwithstanding jurisdiction to consider prior order permitting trustee to recover funds that appellant had demanded in violation of automatic stay. *See* *Cal. State Bd. of Equalization v. Taxel (In re Del Mission Ltd.)*, 998 F.2d 756, 758 (9th Cir. 1993).

- An appeal concerning an involuntary debtor's "counterclaim" alleging that bankruptcy petition was filed in bad faith would not bring up on appeal the prior dismissal of the involuntary petition. *See* *Miyao v. Kuntz (In re Sweet Transfer & Storage, Inc.)*, 896 F.2d 1189, 1191 (9th Cir. 1990).

- A debtor's appeal under 28 U.S.C. § 1293 (now repealed) of order for relief granted by district court in involuntary bankruptcy proceeding did not extend to discovery rulings where court of appeals affirmed order for relief without reference to subject matter of disputed documents. *See Hayes v. Rewald (In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.)*, 779 F.2d 471, 476 (9th Cir. 1985).

- An appeal from an automatic stay order did not extend to an order withdrawing the case from the bankruptcy court. *See Packerland Packing Co. v. Griffith Brokerage Co. (In re Kemble)*, 776 F.2d 802, 805-06 (9th Cir. 1985). *But cf. Sec. Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999, 1008 (9th Cir. 1997) (reviewing order withdrawing reference on appeal from summary judgment).

- Where time to appeal underlying judgments had expired, appeals from rulings on motion to reconsider or motion for relief from judgment would not bring up underlying judgments. *See Nat'l Bank v. Donovan (In re Donovan)*, 871 F.2d 807, 808 (9th Cir. 1989) (per curiam) (motion to reconsider); *First Nat'l Bank v. Roach (In re Roach)*, 660 F.2d 1316, 1318 (9th Cir. 1981) (motion for relief from judgment).

d. Issues Undecided Below

Issues left undecided by the BAP or district court may not merge into their final decisions. *See Universal Life Church, Inc. v. United States (In re Universal Life Church, Inc.)*, 128 F.3d 1294, 1300 (9th Cir. 1997) (dismissing part of appeal because district court did not rule on issue). *But cf. Pizza of Haw., Inc. v. Shakey's, Inc. (In re Pizza of Haw., Inc.)*, 761 F.2d 1374, 1378 n.8 (9th Cir. 1985) (noting that, in reviewing district court order vacating plan for reorganization in light of new claim, court of appeals could also review whether creditor had standing to bring new claim whether or not bankruptcy court had ruled on the issue).

2. WAIVER OF ISSUES

The requirement that issues first be raised below is applied more flexibly in nonadversarial bankruptcy appeals, but to be raised for the first time on appeal, an

issue still must not require further factual development of the record. *See* *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1213-14 & n.4 (9th Cir. 1994); *cf.* *Briggs v. Kent (In re Prof'l Inv. Props. of Am.)*, 955 F.2d 623, 625 (9th Cir. 1992) (stating three exceptions to rule that issues not raised below will not be considered on appeal, and concluding that new issue could be raised because record was fully developed and issue did not yet exist below); *see also* *Focus Media, Inc. v. National Broadcasting Co., Inc. (In re Focus Media, Inc.)*, 378 F.3d 916, 924 n.7 (9th Cir. 2004) (issue not articulated before bankruptcy court and first raised before appellate court was waived). Even though an appellate court's review of a bankruptcy court's decision is conducted independent of the BAP's review, arguments not raised on appeal to the BAP are waived at the appellate level. *Burnett v. Resurgent Capital Servs. (In re Burnett)*, 435 F.3d 971, 976-77 (9th Cir. 2006) (explaining that issues not presented to BAP and raised for first time on appeal were waived unless there were "exceptional circumstances" to indicate appellate court should exercise discretion to consider the issues); *see also* *Educ. Credit Mgmt. Corp. v. Mason (In re Mason)*, 464 F.3d 878, 882 n.3 (9th Cir. 2006).

The contents of notices of appeal from bankruptcy court decisions are governed by Fed. R. Bankr. P. 8001(a), which requires only that a notice "contain the names of all parties to the judgment, order, or decree appealed from." *United States v. Arkison (In re Cascade Rds., Inc.)*, 34 F.3d 756, 761-62 (9th Cir. 1994) (comparing Fed. R. App. P. 3(c)). Issues on appeal are not limited by the statement of issues required under Fed. R. Bankr. P. 8006. *See* *Office of the U.S. Tr. v. Hayes (In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.)*, 104 F.3d 1147, 1148 (9th Cir. 1997) (per curiam) (applying court of appeals' own rules of issue preservation instead of Rule 8006). Moreover, parties may raise issues first raised by the BAP or district court reviewing a bankruptcy decision. *See* *Feder v. Lazar (In re Lazar)*, 83 F.3d 306, 308 n.7 (9th Cir. 1996); *Verco Indus. v. Spartan Plastics (In re Verco Indus.)*, 704 F.2d 1134, 1138 (9th Cir. 1983).

Note, however, that parties have been held to their position before the district court that a bankruptcy court order was interlocutory where they later take a contrary position in the court of appeals. *See* *Ryther v. Lumber Prods., Inc. (In re Ryther)*, 799 F.2d 1412, 1414 (9th Cir. 1986).

E. DECISIONS BARRED FROM REVIEW IN COURT OF APPEALS

1. DECISIONS WHETHER TO REMAND TO STATE COURT

An order remanding a bankruptcy matter to state court under 28 U.S.C. § 1447(c), due to a timely-raised defect in removal procedure or lack of subject matter jurisdiction, is not reviewable by appeal or otherwise in the court of appeals. *See* 28 U.S.C. § 1447(d); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28 (1995); *Benedor Corp. v. Conejo Enters. (In re Conejo Enters.)*, 96 F.3d 346, 350-51 (9th Cir. 1996).

> *Cross-reference*: II.C.24 (regarding the nonreviewability of remand orders under 28 U.S.C. § 1447(d) generally).

A decision granting or denying remand under 28 U.S.C. § 1452(b) is similarly immune from review. *See* 28 U.S.C. § 1452(b); *Sec. Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999, 1009 & n.7, 1010 (9th Cir. 1997) (noting that decision not to remand to state court is not reviewable except to inquire whether district court has subject matter jurisdiction); *cf. City & County of San Francisco v. Pacific Gas & Elec. Corp.*, 433 F.3d 1115, 1121 (9th Cir. 2006) (review of the district court's order denying remand was not precluded by 28 U.S.C. § 1447(d), which only applies to cases remanded where there is a defect in the removal procedure or the district court lacks jurisdiction).

2. DECISIONS WHETHER TO ABSTAIN

A decision to abstain or not under 28 U.S.C. § 1334(c) is not reviewable by the court of appeals, unless it is pursuant to § 1334(c)(2) (requiring courts to abstain from deciding certain state law claims). *See* 28 U.S.C. § 1334(d); *see also Benedor Corp. v. Conejo Enters. (In re Conejo Enters.)*, 96 F.3d 346, 352 (9th Cir. 1996) (even where abstention is mandatory under § 1334(c)(2), bankruptcy court order granting relief from automatic stay and district court order reversing such relief are subject to review).

3. DECISIONS WHETHER TO DISMISS OR STAY

A decision to stay or dismiss, or not to stay or dismiss, bankruptcy proceedings under 11 U.S.C. § 305(a) is not subject to review by the court of appeals. *See* 11 U.S.C. § 305(c); *Marsch v. Marsch (In re Marsch)*, 36 F.3d 825, 828 n.1 (9th Cir. 1994) (per curiam) (BAP decision affirming bankruptcy court's dismissal under 11 U.S.C. § 305(a)(1) not reviewable by court of appeals).

4. DECISIONS NOT APPEALABLE BY CERTAIN ENTITIES

Certain entities may not appeal particular decisions to the court of appeals:

a. Securities and Exchange Commission

See 11 U.S.C. § 1109(a) (precluding appeals by the Securities and Exchange Commission in Chapter 11 cases).

b. Federal Transportation Agencies

See 11 U.S.C. § 1164 (precluding appeals by the Surface Transportation Board and the Department of Transportation in Chapter 11 cases).

c. Labor Unions

See Fed. R. Bankr. P. 2018(d) (precluding certain appeals by labor unions).

d. State and Local Commissions

See 11 U.S.C. § 1164 (precluding appeals by "any State or local commission having regulatory jurisdiction over the debtor" in Chapter 11 cases).

e. State Attorneys General

See Fed. R. Bankr. P. 2018(b) (precluding appeals by state attorneys general in cases under Chapters 7, 11, 12, or 13).

F. CONSTITUTIONAL ISSUES IN BANKRUPTCY APPEALS

1. STANDING TO APPEAL

a. General Rule

"[B]ankruptcy litigation . . . almost always implicates the interests of persons who are not formally parties to the litigation." *Tilley v. Vucurevich (In re Pecan Groves)*, 951 F.2d 242, 245 (9th Cir. 1991). Therefore, in the interest of "[e]fficient judicial administration," *id.*, standing to appeal is limited as follows:

> [A]n appellant must show that it is a "person aggrieved," [that is, one] who was directly and adversely affected pecuniarily by an order of the bankruptcy court. The order must diminish the appellant's property, increase its burdens, or detrimentally affect its rights.

McClellan Fed. Credit Union v. Parker (In re Parker), 139 F.3d 668, 670 (9th Cir. 1998) (internal quotations, punctuation, and citations omitted); *accord* *Everex Sys., Inc. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673, 675 (9th Cir. 1996).

Attendance and objection during the bankruptcy proceedings are usually prerequisites to fulfilling the "person aggrieved" standard for standing to appeal, unless the objecting party did not receive notice both of the proceedings below and of an opportunity to object. *See* *Brady v. Andrew (In re Commercial W. Fin. Corp.)*, 761 F.2d 1329, 1335 (9th Cir. 1985); *see also* *McClellan Fed. Credit Union v. Parker (In re Parker)*, 139 F.3d 668, 671 n.1 (9th Cir. 1998).

Even where a party meets the "person aggrieved" standard, general standing principles may still preclude appeal. *See* *Moneymaker v. CoBen (In re Eisen)*, 31 F.3d 1447, 1451 n.2 (9th Cir. 1994) (debtor lacked standing to appeal where the trustee, not the debtor, was the representative of the estate and was vested with the debtor's causes of action, such that the trustee was the only party with standing to appeal).

b. Examples of Standing to Appeal

Standing to appeal has been found in the following cases:

- SEC had standing to bring motion to dismiss for cause because it had a pecuniary interest as creditor in a portion of the debt. *See* *Sherman v. Sec. Exchange Comm'n. (In re Sherman)*, 491 F.3d 948, 965 (9th Cir. 2007).

- A credit union had standing to appeal the bankruptcy court's denial of a debtor's reaffirmation of debt owed to the credit union where the creditor was at risk of recovering less from the debtor as a result of bankruptcy court's order. *See* *McClellan Fed. Credit Union v. Parker (In re Parker)*, 139 F.3d 668, 671 (9th Cir. 1998).

- A successful buyer of a substantial portion of the debtor's assets had standing to appeal from an order denying the debtor's motion to assume a license and assign it to the buyer per terms of sale. *See* *Everex Sys., Inc. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673, 675-76 (9th Cir. 1996) (distinguishing cases in which unsuccessful bidders for debtor's assets at bankruptcy sale were held to lack standing to appeal).

- A creditor could appeal the bankruptcy court's refusal to permit the withdrawal of proofs of claim without prejudice when the creditor subsequently withdrew the claims with prejudice after the bankruptcy court provided creditor with no real alternative. *See* *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1399 (9th Cir. 1995) (assuming party had standing to appeal).

- Investors had standing to appeal an order confirming a reorganization plan that eliminated the investors' interests in notes and deeds of trust where trustee failed to give investors proper notification of consequences of plan. *See* *Brady v. Andrew (In re Commercial W. Fin. Corp.)*, 761 F.2d 1329, 1335 (9th Cir. 1985).

- "[I]n a case involving competing claims to a limited fund, a claimant has standing to appeal an order disposing of assets from which the

claimant seeks to be paid." *Salomon v. Logan (In re Int'l Envtl. Dynamics, Inc.)*, 718 F.2d 322, 326 (9th Cir. 1983).

- A United States Trustee has standing to appeal the bankruptcy court's denial of her motion for disgorgement of payments previously received by counsel for former debtor-in-possession, pursuant 11 U.S.C. § 307, which authorizes a United States Trustee to be heard on any issue in any case or proceeding under Title 11. *Stanley v. McCormick (In re Donovan Corp.)*, 215 F.3d 929, 930 (9th Cir. 2000).

  Cross-reference: VI.E (regarding the preclusion of certain entities from appealing certain decisions, apparently regardless of whether they would otherwise have standing).

c. Examples of No Standing to Appeal

Lack of standing to appeal has been found in these cases:

- Neither unsecured creditors nor lienholders in property had standing to challenge the sale of estate property on the ground the sale allegedly violated the automatic stay. *See Tilley v. Vucurevich (In re Pecan Groves)*, 951 F.2d 242, 245-46 (9th Cir. 1991).

- The spouse of a debtor lacked standing to appeal an order appointing special counsel to aid the trustee in uncovering fraudulent conveyances involving debtor and spouse. *See Fondiller v. Robertson (In re Fondiller)*, 707 F.2d 441, 443 (9th Cir. 1983) (noting that bankruptcy court order had "no direct and immediate impact on appellant's pecuniary interests"– that is, it did not "diminish her property, increase her burdens, or detrimentally affect her rights"; instead, "appellant's only demonstrable interest in the order [was] as a potential party defendant in an adversary proceeding," apparently to recover fraudulent conveyances).

2. MOOTNESS

"The party asserting mootness has a heavy burden to establish that there is no effective relief remaining for a court to provide." *Pintlar Corp. v. Fid. & Cas. Co. (In re Pintlar Corp.)*, 124 F.3d 1310, 1312 (9th Cir. 1997).

a. Appeals Concerning Property Transactions

i. Generally

Under 11 U.S.C. § 363(b)(1), "[t]he trustee, after notice and a hearing, may use, sell, or lease, other then in the ordinary course of business, property of the estate." When the bankruptcy court authorizes such a transaction, the authorized transaction must be stayed pending appeal to prevent the appeal from becoming moot upon the good faith completion of the transaction:

> [R]eversal or modification on appeal . . . does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m); *accord* *Ewell v. Diebert (In re Ewell)*, 958 F.2d 276, 282 (9th Cir. 1992) (concluding that, if § 363(m) applies, then appellate courts cannot grant any effective relief and an appeal becomes moot).

Even apart from § 363(m), a "[f]ailure actually to stay a foreclosure sale generally renders an appeal regarding that sale moot." *Nat'l Mass Media Telecomm. Sys., Inc. v. Stanley (In re Nat'l Mass Media Telecomm. Sys., Inc.)*, 152 F.3d 1178, 1180 (9th Cir. 1998) (in absence of stay, eventual sale of debtor's property to a non-party renders the debtor's appeal constitutionally moot where debtor seeks only a return of its property).

ii. Broad Application of Stay Requirement

By its terms, § 363(m) applies not only to orders authorizing transactions, but also to orders issued under § 363(c) preventing a trustee from "enter[ing] into

transactions, including the sale or lease of property of the estate, in the ordinary course of business." 11 U.S.C. § 363(c). Moreover, the rule applies whether the order on appeal directly approves a sale or simply lifts the automatic stay to permit a sale of property. *See* *Onouli-Kona Land Co. v. Estate of Richards (In re Onouli-Kona Land Co.)*, 846 F.2d 1170, 1171 (9th Cir. 1988). The rule also is not limited to sales by a bankruptcy trustee or to real property transactions. *Id.* at 1172; *see also* *Alegeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421, 1423-24 (9th Cir. 1985) (applying § 363(m) to foreclosure sale of stock).

iii. Good Faith Requirement

(a) General Rule

To determine whether consummation of a transaction was in good faith so as to moot an appeal under § 363(m), "courts generally have followed traditional equitable principles in holding that a good faith purchaser is one who buys 'in good faith' and 'for value,'" such that lack of good faith is typically shown through fraud, collusion, and taking grossly unfair advantage of other bidders. *See* *Ewell v. Diebert (In re Ewell)*, 958 F.2d 276, 281 (9th Cir. 1992).

The good faith requirement will protect parties "who can advance reasonable legal arguments in support of their actions, even if their arguments are ultimately deemed unpersuasive," and good faith is not defeated where other parties withhold consent that was not required by bankruptcy law. *See* *Burchinal v. Cent. Wash. Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484, 1490 (9th Cir. 1987) (analyzing similar "good faith" requirement under 11 U.S.C. § 364(e) based on cases decided under § 363(m)).

(b) Example of Bad Faith

Where the buyers of property at a tax sale all had notice of the bankruptcy before proceedings in which they sought a tax deed, the debtor's failure to obtain a stay pending appeal of bankruptcy court's order upholding sale despite violation of automatic stay did not moot appeal because buyers' notice of bankruptcy precluded good faith transaction. *See* *Phoenix Bond & Indem. Co. v. Shamblin (In re Shamblin)*, 890 F.2d 123, 125 (9th Cir. 1989). *But cf.* 11 U.S.C. § 363(m)

(concluding that transaction participants' notice of pending appeal was not sufficient to show bad faith).

(c) Examples of Good Faith

A trustee's sale of estate property to the trustee's former corporate employer, which was owned by the brother of the debtor's former husband, was not in bad faith where terms were fair and reasonable. *See* Ewell v. Diebert (In re Ewell), 958 F.2d 276, 281 (9th Cir. 1992) (concluding bankruptcy court's findings were not clearly erroneous).

Appellant failed to show lack of good faith where sale was conducted according to "scrupulous[]" application of state law, terms of auction did not give purchaser a grossly unfair advantage, and purchaser's opposition to defendant's motion to continue hearing confirmation sale "simply sought to enforce the auction's original terms." *Onouli-Kona Land Co. v. Estate of Richards (In re Onouli-Kona Land Co.)*, 846 F.2d 1170, 1173-74 (9th Cir. 1988).

iv. Need for Transaction Participants to Be Present on Appeal to Avoid Mootness

Early cases suggest that the presence before the court of appeals of all participants in a property transaction would be sufficient to prevent mootness. *See* Crown Life Ins. Co. v. Springpark Assocs. (In re Springpark Assocs.), 623 F.2d 1377, 1379 (9th Cir. 1980) (concluding that appeal from order lifting automatic stay and permitting foreclosure sale of property remained alive because purchaser was a party to the appeal such that "it would not be impossible for the Court to fashion some sort of relief").

However, while the presence of the transaction participants appears to be a necessary condition to prevent mootness in cases where no stay exists and a transaction has occurred, it probably is not sufficient. *See* Onouli-Kona Land Co. v. Estate of Richards (In re Onouli-Kona Land Co.), 846 F.2d 1170, 1173 (9th Cir. 1988) (reconciling tension in Ninth Circuit cases by concluding that mootness rule does not apply in cases where "real property is sold to a creditor who is a party to the appeal, but only when the sale is subject to [state] statutory rights of redemption"); *see also* Suter v. Goedert, 504 F.3d 982, 990 (9th Cir. 2007). *But cf.*

SEC v. Am. Capital Invs., Inc., 98 F.3d 1133, 1140 (9th Cir. 1996) (non-bankruptcy case suggesting that issue remains unresolved), *abrogated on other grounds by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

The need for all transaction participants to be present on appeal in order to prevent mootness applies even where the good faith requirement of § 363(m) is not met. *See Casady v. Bucher (In re Royal Props., Inc.)*, 621 F.2d 984, 986-87 (9th Cir. 1980) (affirming district court's dismissal for mootness).

v. Exceptions to Mootness

(a) Rights under State Law

The mootness rule under § 363(m) is subject to the following exceptions related to state law rights:

- Where real property is sold subject to a statutory right of redemption. *See Suter v. Goedert*, 504 F.3d 982, 990 (9th Cir. 2007) (finding no state statutory right of redemption); *Sun Valley Ranches, Inc. v. Equitable Life Assurance Soc'y of the U.S. (In re Sun Valley Ranches, Inc.)*, 823 F.2d 1373, 1374-75 (9th Cir. 1987) (sale of debtor's property did not moot appeal despite absence of stay because purchaser was a party to the appeal and debtor retained a statutory right of redemption).

- Where state law otherwise would permit the transaction to be set aside. *See Rosner v. Worcester (In re Worcester)*, 811 F.2d 1224, 1228 (9th Cir. 1987) (declining to state what action might have been stayed, court finds that failure to obtain stay did not moot appeal where applicable state law still provided means by which court could grant relief).

See also Mann v. Alexander Dawson Inc. (In re Mann), 907 F.2d 923, 926-28 (9th Cir. 1990) (reviewing whether foreclosure met either exception, but finding appeal moot where state law right of redemption had expired before debtor filed petition and debtor could not invoke any other right under state law that permitted foreclosure to be set aside).

Filing a lis pendens alone will not prevent a sale of property from mooting a bankruptcy appeal concerning the property if party fails to obtain a stay in bankruptcy court. *See* *Onouli-Kona Land Co. v. Estate of Richards (In re Onouli-Kona Land Co.)*, 846 F.2d 1170, 1174 (9th Cir. 1988); *Wood v. Walker-Pinkston Cos. (In re The Brickyard)*, 735 F.2d 1154, 1158-59 (9th Cir. 1984).

(b) Transactions Conditioned on Outcome of Appeal

Another exception may exist where transaction documents expressly condition the purchaser's interest on the outcome of a pending appeal, at least where the purchaser is a party to the appeal. *See* *Taylor v. Lake (In re CADA Invs., Inc.)*, 664 F.2d 1158, 1160-61 (9th Cir. 1981) (applying former bankruptcy Rule 805).

(c) Availability of Damages

At least where the bankruptcy court provides for possible damages arising from a completed transaction, the possibility of future litigation concerning the transaction may prevent mootness. *See* *Unsecured Creditors' Comm. v. Southmark Corp. (In re Robert L. Helms Constr. & Dev. Co.)*, 139 F.3d 702, 704 (9th Cir. 1998) (en banc). *But cf.* *Spacek v. Tabatabay (In re Universal Farming Indus.)*, 873 F.2d 1332, 1333-34 (9th Cir. 1989) (holding that mere possibility of future litigation concerning value of note and deed of trust not enough to sustain present controversy over the relative priorities of two notes and deeds of trust where documents have come into the same ownership).

vi. Rejected Theories for Avoiding Mootness

The fact that appellee was responsible for transactions does not prevent mootness, at least where appellee was the bankruptcy trustee acting pursuant to orders authorizing and confirming the transactions. *See* *Bennett v. Gemmill (In re Combined Metals Reduction Co.)*, 557 F.2d 179, 189-90 (9th Cir. 1977).

The fact that a party's attack on a transaction may be based on a broad challenge to the bankruptcy proceedings generally is not enough to sustain a

controversy concerning a transaction where no stay has been obtained. *See id.* at 190.

The exception to mootness based on events that are "capable of repetition but . . . evade review" is not applicable where mootness resulted from appellant failing to obtain a stay. *See id.* at 190-91.

A subsequent order reaffirming transaction that, in the absence of a stay, mooted the initial challenge does not allow challenger to renew attack on transaction. *See Dunlavey v. Ariz. Title Ins. & Trust Co. (In re Charlton)*, 708 F.2d 1449, 1455 (9th Cir. 1983) (applying former bankruptcy Rule 805).

vii. Scope of Mootness

Where the only remedy sought on appeal is the return of property sold to a non-party, all of appellant's claims are moot "no matter how many theories it had in support of its claim for return of the property." *Nat'l Mass Media Telecomm. Sys., Inc. v. Stanley (In re Nat'l Mass Media Telecomm. Sys., Inc.)*, 152 F.3d 1178, 1181 (9th Cir. 1998).

On the other hand, although a sale of property may moot portions of an appeal, other portions of the case may remain alive. *See Wood v. Walker-Pinkston Cos. (In re The Brickyard)*, 735 F.2d 1154, 1158-59 (9th Cir. 1984) (sale of alleged debtor's principal asset mooted challenge to sale, but petitioner's appeal from dismissal of involuntary petition may not be moot, at least if alleged debtor has other assets); *Bennett v. Gemmill (In re Combined Metals Reduction Co.)*, 557 F.2d 179, 193-95 (9th Cir. 1977) (issues unrelated to transactions carried out pursuant to unstayed court orders may remain alive and, specifically, issues concerning trustee's breach of fiduciary duty and a challenge to confirmation of reorganization plan). *But cf. Casady v. Bucher (In re Royal Props., Inc.)*, 621 F.2d 984, 987 (9th Cir. 1980) (concluding that where portion of sales transaction had not been carried out, appeal was still moot as to all portions because purchasers were not parties to appeal, and "[a] reversal of part of the order authorizing sale is not possible without affecting the entire agreement").

While disposal of property may not moot all issues relating to the property, it may divest the federal courts of jurisdiction to hear issues relating to property no

longer part of the bankruptcy estate. *See* *Cmty. Thrift & Loan v. Suchy (In re Suchy)*, 786 F.2d 900, 901-02 (9th Cir. 1985) (concluding that, under former bankruptcy rule, absence of stay and foreclosure on debtors' property placed property outside bankruptcy estate such that debtors' claims for equitable relief and monetary damages based on misrepresentations in connection with mortgage did not "relate to" the debtors' bankruptcy, and district court therefore correctly dismissed claims for lack of subject matter jurisdiction).

b. Appeals Concerning Loan Transactions

Under 11 U.S.C. § 364(b), (c), a trustee may seek authorization to obtain credit or incur debt in ways that include assigning certain priorities to the obligation, securing the obligation with liens, and subordinating other liens. When the bankruptcy court authorizes such transactions, § 364(e) essentially requires a stay to appeal the order, much as 11 U.S.C. § 363(m) does. *See* *Burchinal v. Cent. Wash. Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484, 1487-91 (9th Cir. 1987) (finding appeal moot under § 364(e) after looking to cases decided under § 363(m)); *see also* *Transamerica Commercial Fin. Corp. v. Citibank, N.A. (In re Sun Runner Marine, Inc.)*, 945 F.2d 1089, 1095 (9th Cir. 1995) (concluding appeal was not moot under 11 U.S.C. § 364(e) in part because appealed order had prospective effect that could still be reviewed).

c. Appeals Concerning Reorganization Plans

On appeal from an order confirming a reorganization plan, "[f]ailure to obtain a stay, standing alone, is often fatal but not necessarily so; nor is the 'substantial culmination' of a relatively simple reorganization plan." *Baker & Drake, Inc. v. Pub. Serv. Comm'n (In re Baker & Drake, Inc.)*, 35 F.3d 1348, 1351 (9th Cir. 1994). Whether substantial culmination of a reorganization plan moots an appeal "turns on what is practical and equitable." *Id.* at 1352; *cf.* 11 U.S.C. § 1101(2) (defining "substantial consummation" of reorganization plan).

An appeal from an order confirming a plan of arrangement is moot where "property transactions do not stand independently and apart from the plan of arrangement" and where "the plan of arrangement has been so far implemented that it is impossible to fashion effective relief." *Trone v. Roberts Farms, Inc. (In re*

Roberts Farms, Inc.), 652 F.2d 793, 797-98 (9th Cir. 1981) (applying former bankruptcy rule).

Appeals from reorganization plans have been held *not* moot in the following cases:

- Where debtor incurred debt without authorization of the bankruptcy court and where bankruptcy court authorized the debt *nunc pro tunc*. *Sherman v. Harbin (In re Harbin)*, 486 F.3d 510, 521 n.9 (9th Cir. 2007).

- Where only one transaction had occurred such that plan had not been "substantially culminated," and where entities involved in transaction were parties to appeal such that transaction could be reversed, appeal regarding confirmation of reorganization plan not moot despite lack of stay. *See* *Arnold & Baker Farms v. United States (In re Arnold & Baker Farms)*, 85 F.3d 1415, 1419-20 (9th Cir. 1996).

- The state's appeal from an injunction in bankruptcy case barring enforcement of law prohibiting cabbies from working as independent contractors was not moot where consequences of undoing cabbies' steps toward becoming independent contractors were not severe enough to render relief impracticable and vacatur of injunction might be done on a prospective basis. *See* *Baker & Drake, Inc. v. Pub. Serv. Comm'n (In re Baker & Drake, Inc.)*, 35 F.3d 1348, 1351-52 (9th Cir. 1994) (stating also that case fell between extremes, on the one hand involving a reorganization plan that included transactions with third parties, yet transactions were leases not sales and did not involve innumerable parties).

- Because "the plan still controls the actions of the trustee" and reversal of the confirmation order might affect the debtor's status in the bankruptcy proceedings, challenge to confirmation of reorganization plan remained alive even though "much of the debtor's property ha[d] been liquidated, and many of the creditors ha[d] been paid." *Bennett v. Gemmill (In re Combined Metals Reduction Co.)*, 557 F.2d 179, 194-95 (9th Cir. 1977).

d. Payment of, or Inability to Pay, Judgments, Settlements or Fees

i. Payment

Where a party to an appeal pays a judgment, an appeal from the judgment will remain a live controversy where the payee is also a party to the appeal and it would not be inequitable to order return of the payment. *See* *United States v. Arkison (In re Cascade Rds., Inc.)*, 34 F.3d 756, 759-61 (9th Cir. 1994) (concluding that government's payment of judgment, despite its appeal seeking to set off judgment against debts owed by debtor, did not moot appeal because it would not be inequitable to order payee to return payment where payee, the debtor's trustee, was a party to the appeal and was on notice that government would seek to recover payment if it prevailed on appeal); *cf.* *Bennett. v. Gemmill (In re Combined Metals Reduction Co.)*, 557 F.2d 179, 193-94 (9th Cir. 1977) (holding that where appeal concerns a challenge to the trustee settling a creditor's claim but settlement has been implemented and the creditor is not a party to the appeal, the challenge to the settlement itself is moot).

Similarly, an entity who makes financial arrangements or pays fees based on a lower court decision does not necessarily moot an appeal where the entity is a party to the appeal and it would not be inequitable to order the arrangements undone. *See* *Spirtos v. Moreno (In re Spirtos)*, 992 F.2d 1004, 1006-07 (9th Cir. 1993) (determining that where creditor failed to obtain stay of bankruptcy court order finding that interests in pension plans held by debtor's estate were exempt and debtor subsequently stripped plans of assets, appeal was not moot because court of appeals could "order[] Debtor, who is a party to this appeal, to return the money to the estate," and such an order would be equitable where "Debtor knew at the time he received and spent his plan distribution that [the creditor] had appealed the bankruptcy court's decision"); *Salomon v. Logan (In re Int'l Envtl. Dynamics, Inc.)*, 718 F.2d 322, 325-26 (9th Cir. 1983) (payment of interim attorney's fees per bankruptcy court order did not moot appeal where payee was party to the appeal, permitting court of appeals to order the return of any erroneously distributed funds, and where it would not be inequitable to hear merits of appeal because payee knew that bankruptcy court's order would be challenged).

ii. Inability to Pay

The availability of unencumbered funds held by an estate will preclude mootness based on the estate's alleged inability to pay certain claims. *See St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1533 & n.8 (9th Cir. 1994) (concluding appeal was not moot where trustee's claim did not depend on distributed amounts and debtor failed either to produce direct proof that all assets had been disbursed or showed that trustee could not obtain funds from unencumbered assets or future earnings, and debtor also failed to show why bankruptcy court could not order return of erroneously distributed funds), *amended* 46 F.3d 969 (9th Cir. 1995); *Bear v. Coben (In re Golden Plan of Cal., Inc.)*, 829 F.2d 705, 708 (9th Cir. 1986) (holding that, despite party's failure to obtain a stay of district court's judgment, appeal was not moot due to availability of funds held by the trustee).

e. Dismissal of Bankruptcy Case While Appeal is Pending

"[W]hether a case or controversy remains after the dismissal of a bankruptcy case depends on whether the issue being litigated directly involves the reorganization of the debtor's estate." *Spacek v. Tabatabay (In re Universal Farming Indus.)*, 873 F.2d 1332, 1333 (9th Cir. 1989) (discussing examples of moot and not moot appeals). An appeal becomes moot when during its pendency the bankruptcy court dismisses an underlying Chapter 13 proceeding because the debtors failed to comply with its requirements. *IRS v. Pattullo (In re Pattullo)*, 271 F.3d 898, 901-02 (9th Cir. 2001) (order). It is not enough to sustain the case if the issue on appeal simply might relate to future litigation. *See Spacek v. Tabatabay (In re Universal Farming Indus.)*, 873 F.2d 1332, 1333-34 (9th Cir. 1989) (stating that possibility that a future case might be filed concerning the value of a note and deed of trust is not enough to sustain present controversy over the relative priorities of two notes and deeds of trust where the documents have come into the same ownership) Under this standard, the appeal in *Spacek v. Tabatabay (In re Universal Farming Indus.)*, 873 F.2d 1334, 1335-36 (9th Cir. 1989) was held *not* moot.

The following cases held appeals to be moot:

- *W. Farm Credit Bank v. Davenport (In re Davenport)*, 40 F.3d 298, 299 (9th Cir. 1994) (per curiam) (debtor's dismissal of their Chapter 12 petition mooted creditor's appeal from confirmation of reorganization plan where creditor could still obtain review of issue in another case);

- *Cook v. Fletcher (In re Cook)*, 730 F.2d 1324, 1326 (9th Cir. 1984) (finding moot an appeal from a district court decision affirming the forfeiture of property apparently under a sale contract because appeal arose from Chapter 11 proceedings that were dismissed pending appeal, appellants failed to appeal from discharge subsequently obtained in Chapter 7 proceedings that had closed the estate, and appellants failed to obtain a stay pending appeal);

- *Armel Laminates, Inc. v. Lomas & Nettleton Co. (Income Prop. Builders, Inc.)*, 699 F.2d 963, 964 (9th Cir. 1982) (per curiam) (holding that creditor's appeal from order lifting automatic stay to permit foreclosure became moot when bankruptcy court dismissed debtor's petition and creditor did not appeal the dismissal).

f. Nature of Stay Needed to Prevent Mootness

i. Stay Must Be Issued by Court with Jurisdiction

A stay issued by the bankruptcy court after a notice of appeal has been filed is ineffective where the notice of appeal divested the bankruptcy court of jurisdiction. *See* *Burchinal v. Cent. Wash. Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484, 1489 (9th Cir. 1987) (holding that bankruptcy court's issuance of stay could not prevent mootness under 11 U.S.C. § 364(e) in part because appeal from order had already been filed divesting bankruptcy court of jurisdiction).

ii. Stay Must Pertain to Affected Transactions

To prevent mootness, the terms of the stay must cover the transactions that allegedly mooted an appeal. *See* *Bennett v. Gemmill (In re Combined Metals*

Reduction Co.), 557 F.2d 179, 193 (9th Cir. 1977) (noting that where an order authorizing a sale has been stayed, but a subsequent order authorizing a different sale of the same property has not been stayed, a sale under the second order will moot an appeal from the first order).

iii. Stay Must Cover Time of Affected Transactions

Any stay that is obtained must remain in place "pending appeal." *See* *Ewell v. Diebert (In re Ewell)*, 958 F.2d 276, 280 (9th Cir. 1992); *cf.* Fed. R. Bankr. P. 7062 (limiting applicability of automatic 10-day stay of execution following bankruptcy court judgment); Fed. R. Bankr. P. 8017 (providing for 10-day stay following decisions by the BAP or district courts acting in appellate capacity).

VII. AGENCY AND TAX COURT APPEALS

A. AGENCY DECISIONS GENERALLY

1. INITIATING APPELLATE REVIEW OF AGENCY DECISIONS

District review of agency decisions by the court of appeals is initiated by filing a petition for review as provided in Fed. R. App. P. 15(a):

> Review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order . . . In this rule 'agency' includes an agency, board, commission, or officer; 'petition for review' includes a petition to enjoin, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute.

Fed. R. App. P. 15(a) (also covering content of petitions for review, and providing for joint petitions and applications by agencies for enforcement of their decisions). Regarding time period in which to petition for review, see particular statutes authorizing review, many of which are set out below.

2. AGENCY DECISIONS FOR WHICH DIRECT REVIEW BY THE COURT OF APPEALS IS AUTHORIZED

a. Specific Agencies

Petitions for review of decisions of the following agencies may be filed in the court of appeals pursuant to the indicated statutes:

- **Agriculture, Secretary or Department of**. *See* 28 U.S.C. § 2342(2) (providing for review of all final orders made under Chapters 9 and 20A of Title 7, except orders issued under 7 U.S.C. §§ 210(e), 217a & 499g(a)). Under 7 U.S.C. §§ 194, 1600, and 21 U.S.C. §§ 457(d), 467(c), 607(e) & 1036(b), review is also available for various other decisions issued by the Secretary. Section 1600 of Title 7 authorizes the Secretary to petition for enforcement of certain orders pending the outcome of an appeal.

- **Atomic Energy Commission**. *See* Nuclear Regulatory Commission.

- **Attorney General and Department of Justice**. *See* 21 U.S.C. § 877 (providing for review of certain determinations, findings, and conclusions made under the Controlled Substances Act).

- **Benefits Review Board**. *See* Workers' Compensation, Office of.

- **Bonneville Power Administration**. *See* 16 U.S.C. § 839f(e)(5) (providing for review of final actions and decisions of the Administrator or the Pacific Northwest Electric Power and Conservation Planning Council); *see also* Federal Energy Regulatory Commission.

- **Commodity Futures Trading Commision**. *See* 7 U.S.C. §§ 8, 9, 18(e) (providing for review of reparation orders and decisions regulating "contract markets").

- **Consumer Product Safety Commission**. *See* 15 U.S.C. §§ 1262(e)(3), 2060(a) (providing for review of determinations that a

toy is hazardous, and promulgations of consumer product safety rules).

- **Education, Secretary or Department of**. *See* 20 U.S.C.§§ 1070C-3(b), 1234g (providing for review of orders respecting funding of various educational programs).

- **Energy, Secretary or Department of**. *See* 42 U.S.C. § 10139 (authorizing review of certain storage and disposal decisions under the Nuclear Waste Policy Act).

- **Endangered Species Committee**. *See* 16 U.S.C. § 1536(n) (providing for review of committee decisions regarding exemptions under § 1536(h)).

- **Environmental Protection Agency, Administrator of**. *See* 7 U.S.C. § 136n(b) (providing for review of certain orders under the Federal Insecticide, Fungicide, and Rodenticide Act); 33 U.S.C. § 1369(b)(1) (authorizing review of various decisions under Clean Water Act); 42 U.S.C. § 7607(b)(1) (same, regarding various orders under Clean Air Act, but limiting review of some to the D.C. Circuit); 42 U.S.C. § 300j-7(a)(2) (providing for review of certain final actions under the Safe Drinking Water Act); *see also* *Les v. Reilly*, 968 F.2d 985, 988 (9th Cir. 1992) (finding jurisdiction under 21 U.S.C. § 348(g)(1) to review EPA decision, although statute only refers to decisions under the Federal Food, Drug and Cosmetic Act by Secretary of Health and Human Services); *Nevada v. Watkins*, 939 F.2d 710, 712 n.4 (9th Cir. 1991) (finding jurisdiction under 42 U.S.C. § 2239(b) to review EPA decision, although statute only refers to certain decisions by the President, the Secretary of Energy, and the Nuclear Regulatory Commission).

- **Federal Aviation Administration**. *See* 49 U.S.C. § 46110(a) (authorizing review of orders respecting Administrator's aviation safety duties and powers); *Tur v. FAA*, 4 F.3d 766, 768 (9th Cir. 1993) (recognizing option under former statute of direct appeal to Ninth Circuit from FAA emergency order revoking certificate, rather than

first appealing to NTSB pursuant to statute now codified at 49 U.S.C. § 44709). *See also* National Transportation Safety Board.

- **Federal Communications Commission**. *See* 28 U.S.C. § 2342(1) (providing for review of final FCC orders made reviewable by 47 U.S.C. § 402(a)). *But cf.* 47 U.S.C. § 402(b) (providing for exclusive venue in D.C. Circuit as to certain orders).

- **Federal Energy Regulatory Commission**. *See* 15 U.S.C. § 717r(b) (authorizing review of commission orders regulating natural gas); 16 U.S.C. § 825*l*(b) (same, as to orders under Federal Power Act); *see also* 42 U.S.C. § 7172 (vesting FERC with authority formerly held by Federal Power Commission to render orders reviewable in court of appeals).

- **Federal Highway Administration**. *See Owner-Operators Indep. Drivers Ass'n of Am. v. Skinner*, 931 F.2d 582, 585-90 (9th Cir. 1991) (holding that statute now codified at 49 U.S.C. § 351 conferred upon court of appeals exclusive jurisdiction to review agency's regulations regarding motor carrier safety).

- **Federal Labor Relations Authority**. *See* 5 U.S.C. § 7123(a) (providing for review of any final order, other than those made under 5 U.S.C. §§ 7112, 7122); 5 U.S.C. § 7123(b) (authorizing agency to petition for enforcement of orders).

- **Federal Maritime Commission**. *See* 28 U.S.C. § 2342(3)(B) (providing for review of all rules, regulations, or final orders issued pursuant to 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46.

- **Federal Mine Safety and Health Review Commission**. *See* 30 U.S.C. § 816(a) (authorizing review in court of appeals of various orders issued by commission).

- **Federal Power Commission**. *See* Federal Energy Regulatory Commission.

- **Federal Reserve System, Board of Governors of**. *See* 12 U.S.C. § 1848 (providing for review of orders regulating bank holding companies).

- **Federal Trade Commission**. *See* 15 U.S.C. § 45(c) (authorizing review of commission's cease and desist orders regarding method of competition, act, or practice).

- **Foreign Trade Zone Board**. *See* 19 U.S.C. § 81r(c) (providing for review of decisions revoking zone grants).

- **Health and Human Services, Secretary or Department of**. *See* 21 U.S.C. §§ 348(g)(1), 355(h), 360b(h), 371(f); 42 U.S.C. § 1316(a) (3) (authorizing review of various decisions). *But cf., e.g.*, 42 U.S.C. § 405(g) (challenges to benefits decisions brought in district court).

- **Housing and Urban Development, Secretary or Department of**. *See* 42 U.S.C. § 3612(i) (final orders pursuant to Fair Housing Act); *see also* 28 U.S.C. § 2342(6) (generally providing for review of all final orders under 42 U.S.C. § 3612).

- **Interior, Secretary or Department of**. *See* 43 U.S.C. § 1349(c) (authorizing review of any action to approve, require modification of, or disapprove exploration plans under Outer Continental Shelf Lands Act).

- **Interstate Commerce Commission**. *See* Surface Transportation Board.

- **Justice, Department of**. *See* Attorney General.

- **Labor, Secretary or Department of**. *See* 29 U.S.C. § 210(a) (providing for review of certain wage orders); 49 U.S.C. § 31105(d) (same, as to orders on complaints under whistleblower statue protecting employees who report commercial motor vehicle safety violations).

- **National Labor Relations Board**. *See* 29 U.S.C. § 160(f) (authorizing review of final Board decisions), 29 U.S.C. § 160(e) (authorizing agency to petition for enforcement of orders).

- **National Transportation Safety Board**. *See* 49 U.S.C. § 44709(f) (providing for review of decisions in administrative appeals from Federal Aviation Administration orders affecting certificates).

- **Nuclear Regulatory Commission** (formerly the Atomic Energy Commission). *See* 28 U.S.C. § 2342(4) (providing for review of all final orders of the Atomic Energy Commission made reviewable by 42 U.S.C. § 2239(b), which, in turn, provides for review of orders issued under that section and others, including licensing orders); 42 U.S.C. § 10139 (providing for review of certain storage and disposal decisions under the Nuclear Waste Policy Act).

- **Occupational Safety and Health Review Commission**. *See* 29 U.S.C. §§ 655(f) (authorizing review of promulgation of standards), 660(b) (permitting review of orders enforcing citations, and authorizing agency to petition for enforcement).

- **Pacific Northwest Electric Power and Conservation Planning Council**. *See* Bonneville Power Administration.

- **Railroad Retirement Board**. *See* 45 U.S.C. §§ 231g, 355(f) (authorizing review of final Board decisions).

- **Securities and Exchange Commission**. *See* 15 U.S.C. §§ 77i, 77vvv, 78y(a)(1), 80a-42, 80b-13 (providing for review of orders under the Securities Act, the Trust Indenture Act, the Securities Exchange Act, the Investment Company Act, and the Investment Advisors Act).

- **Surface Transportation Board** (formerly the Interstate Commerce Commission). *See* 28 U.S.C. § 2342(5) (providing for a review of all

rules, regulations, or final orders of the Surface Transportation Board made reviewable by 28 U.S.C. § 2321).

- **Transportation, Secretary or Department of**. *See* 28 U.S.C. § 2342(3)(A) (providing for review of all rules, regulations, or final orders of the Secretary of Transportation issued pursuant to section 50501, 50502, 56101-56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; 28 U.S.C. § 2342(7) (authorizing review of all final agency actions described in 49 U.S.C. § 20114(c), which in turn authorizes review of railroad safety decisions, except to the extent railroad employees are authorized to sue in district court under 49 U.S.C. § 20104(c)); 49 U.S.C. §§ 30161 (providing for review of orders prescribing motor vehicle safety standards), 46110(a) (same, as to orders regulating air commerce and safety). *See also* *Nuclear Info. and Resource Serv. v. Dept. of Transp. Research and Special Programs Admin.*, 457 F.3d 956, 959-60 (9th Cir. 2006).

- **Thrift Supervision, Office of**. *See* 12 U.S.C. § 1818(h)(2) (authorizing review of final orders of "appropriate federal banking agency" regarding insured status of depository institutions); *see also* *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995) (exercising jurisdiction under § 1818(h)(2) to review decision of Office of Thrift Supervision).

- **Treasury, Secretary or Department of the**. *See* 27 U.S.C. § 204(h) (providing for review of permit decisions under Federal Alcohol Administration Act).

- **Workers' Compensation, Office of**. *See* 33 U.S.C. § 921(c) (authorizing review of workers' compensation decisions of the Benefits Review Board).

b. Venue

The foregoing statutes generally include venue provisions providing for filing of petitions in the Ninth Circuit. However, the venue provision for the

Hobbs Administrative Orders Review Act, 28 U.S.C. § 2342, appears in 28 U.S.C. § 2343.

c. Time in Which to Petition for Review

The foregoing statutes also generally specify the time in which petitions for review must be filed. However, the timeliness provision for the Hobbs Administrative Orders Review Act, 28 U.S.C. § 2342, appears in 28 U.S.C. § 2344. Note that time periods in which to petition for review vary widely.

B. IMMIGRATION CASES

Please refer to the Office of Staff Attorneys' Immigration Outline for a summary of appellate jurisdiction over immigration cases.

C. TAX COURT DECISIONS

1. INITIATING APPELLATE REVIEW OF TAX COURT DECISIONS

Under 26 U.S.C. § 7482(a), the courts of appeals other than the Federal Circuit have exclusive jurisdiction to review Tax Court decisions in actions to redetermine tax liability. However, § 7463(b) precludes appellate jurisdiction over "small tax cases," i.e., disputes involving $50,000 or less. *See Cole v. Commissioner*, 958 F.2d 288, 289 (9th Cir. 1992).

To initiate review of a Tax Court decision, a notice of appeal is filed in the Tax Court pursuant to Fed. R. App. P. 13 and Tax Court Rule 190(a).

2. VENUE

Generally, venue in appeals from Tax Court decisions in actions to redetermine tax liability is the circuit that includes the noncorporate taxpayer's legal residence. *See* 26 U.S.C. § 7482(b)(1)(A). Proper venue for appeals by corporations is in the circuit where the corporation's principal place of business or principal office or agency of the corporation is located, or, if none of these apply,

then the circuit in which the IRS office to which the disputed tax return was made. *See* 26 U.S.C. § 7482(b)(1)(B).

The parties may also designate by written stipulation the circuit in which an appeal may be taken. *See* 26 U.S.C. § 7482(b)(2).

3. TIME IN WHICH TO FILE NOTICE OF APPEAL

Notices of appeal from the Tax Court must be filed "within 90 days after the decision of the Tax Court is entered." 26 U.S.C. § 7483. "If a timely notice of appeal is filed by one party, any other party may take an appeal by filing notice of appeal within 120 days after the decision of the Tax Court is entered." *Id.*; *see also* Fed. R. App. P. 13(a). Timely motions to reconsider, or to vacate or revise the Tax Court decision will toll the time in which to appeal. *See* Fed. R. App. P. 13(a); Tax Court Rules 161, 162; *see also Nordvick v. Commissioner*, 67 F.3d 1489, 1493-94 (9th Cir. 1995) (holding that a timely motion to reconsider under Tax Court Rule 161 will terminate the running of the time for appeal).

VIII. DIRECT CRIMINAL APPEALS

A. APPEAL BY DEFENDANT (28 U.S.C. § 1291, 1292(a)(1))

1. STATUTORY AUTHORITY

a. Final Judgment (Sentence)

The final judgment in a criminal case is the sentence. *See United States v. Powell*, 24 F.3d 28, 31 (9th Cir. 1994) (citation omitted) ("In criminal cases, as well as civil, the judgment is final for the purposes of appeal when it terminates the litigation on the merits and leaves nothing to be done but to enforce by execution what has been determined."). The court of appeals generally has jurisdiction over defendant's post-sentence appeal under 28 U.S.C. § 1291. *See, e.g., United States v. Odedo*, 154 F.3d 937, 938 (9th Cir. 1998), *overruled on other grounds by United States v. Vonn*, 535 U.S. 55 (2002); *United States v. Montilla*, 870 F.2d 549, 551 (9th Cir. 1989), *amended*, 907 F.2d 115 (1990).

Notwithstanding that counts remain pending in the district court, the court of appeals has jurisdiction under the final judgment rule when a guilty plea to a subset of charges effectively severs the indictment into two parts. *United States v. King*, 257 F.3d 1013, 1020-21 (9th Cir. 2001).

b. Interlocutory Order (Injunction)

A pretrial order restraining or freezing proceeds from the sale of property allegedly subject to forfeiture may be appealed under 28 U.S.C. § 1292(a)(1). *See United States v. Ripinsky*, 20 F.3d 359, 361 (9th Cir. 1994) (order restraining assets); *United States v. Roth*, 912 F.2d 1131, 1132-33 (9th Cir. 1990) (order freezing sale proceeds).

However, the court of appeals has declined to permit interlocutory appeal under § 1292(a)(1) from certain orders relating to grand jury proceedings. *See United States v. Ryan*, 402 U.S. 530, 534 (1971) (holding that an order denying a motion to quash a subpoena was not appealable as an injunction simply because court "inform[ed] respondent before the event of what efforts the District Court would consider sufficient attempts to comply with the subpoena"); *Fendler v. United States (In re Federal Grand Jury Investigation of Fendler)*, 597 F.2d 1314, 1316 (9th Cir. 1979) (holding that an order denying a stay of grand jury proceedings to permit voir dire was not appealable as an injunction because a stay would not go to merits of the claim and the order denying a stay "neither narrowed the range of activity about which appellant may complain nor restricted the breadth of the relief appellant may obtain").

> *Cross-reference*: II.C.12.b.ii (regarding appealability of orders denying motions to quash generally).

28 U.S.C. § 1292(b) does not confer interlocutory appellate jurisdiction in criminal cases. *United States v. Pace*, 201 F.3d 1116, 1118-19 (9th Cir. 2000), *cert denied*, 531 U.S. 826 (2000). "There is no provision for district court certification of interlocutory criminal appeals analogous to 28 U.S.C. § 1292(b) regarding interlocutory civil appeals." *United States v. Russell*, 804 F.2d 571, 573 n.3 (9th Cir. 1986). *But cf. Valenzuela-Gonzalez v. United States Dist. Court*, 915 F.2d 1276, 1279 (9th Cir. 1990) (noting that defendant could seek mandamus review in part because district court had not certified order under § 1292(b)).

c. Collateral Order

i. Collateral Order Doctrine

Defendants generally must await final judgment before appealing. *See* *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989) (stating that finality requirement generally "prohibits appellate review until after conviction and imposition of sentence").

However, under certain circumstances, an order may be appealed before final judgment under the collateral order doctrine. *See* *United States v. Higuera-Guerrero (In re Copley Press, Inc.)*, 518 F.3d 1022, 1025 (9th Cir. 2008); *United States v. Hitchcock*, 992 F.3d 236, 238 (9th Cir. 1993) (per curiam). To be appealable under the collateral order doctrine, an order must "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." *See* *Higuera-Guerrero*, 518 F.3d at 1025; *see also* *United States v. Hickey*, 367 F.3d 888, 895 (9th Cir. 2004) ("[T]o come under the collateral order doctrine, an interlocutory appeal must challenge an order that conclusively determines an important issue completely separate from the merits of the action that cannot be effectively reviewed on appeal from a final judgment.").

Under the collateral order doctrine, a ruling is not completely separate from the merits if it can be reviewed for harmless error following trial. *See* *United States v. Hitchcock*, 992 F.2d 236, 238 (9th Cir. 1993) (per curiam). A ruling may be effectively unreviewable after final judgment, however, if it involves "a right not to be tried as opposed to a right not to be convicted," and "the right will be 'lost, probably irreparably' if interlocutory appeal is not permitted." *United States v. Saccoccia*, 18 F.3d 795, 800 (9th Cir. 1994); *cf.* *United States v. MacDonald*, 435 U.S. 850, 857 n.6 (1978) ("extraordinary nature" of claim alone not sufficient to permit immediate appeal).

The collateral order doctrine is interpreted "with the utmost strictness" in criminal cases. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (internal quotation marks omitted); *see also* *Higuera-Guerrero*, 518 F.3d at 1025; *United States v. Hickey*, 185 F.3d 1064, 1066 (9th Cir. 1999); *United States v. Lewis*, 368 F.3d 1102, 1105 (9th Cir. 2004), *cert. denied*, 543 U.S. 1053 (2005);

accord *United States v. Moreno-Green*, 881 F.2d 680, 683 (9th Cir. 1989) (per curiam); *see also* *United States v. MacDonald*, 435 U.S. 850, 853-54 (1978) ("The rule of finality has particular force in criminal prosecutions because encouragement of delay is fatal to the vindication of the criminal law.") (internal quotation marks and citation omitted).

ii. Pendent Jurisdiction

A valid appeal of a collateral order does not confer pendent appellate jurisdiction to review nonappealable orders. *See* *United States v. MacDonald*, 435 U.S. 850, 857 n.6 (1978); *Abney v. United States*, 431 U.S. 651, 663 (1977); *United States v. McKinley*, 38 F.3d 428, 431 (9th Cir. 1994); *see also* *United States v. Garner*, 632 F.2d 758, 761 (9th Cir. 1980) (defendant's claim that government violated its own "*Petite* policy" against prosecution of crimes that have been prosecuted in state court could not be raised on appeal of double jeopardy claim); *United States v. Gutierrez-Zamarano*, 23 F.3d 235, 239 (9th Cir. 1994) (defendant's claim that he established entrapment as a matter of law at his first trial could not be raised on appeal with double jeopardy claims). *But see* *United States v. Sandoval-Lopez*, 122 F.3d 797, 799-800 (9th Cir. 1997) (because defendants' plea agreement issues involved same facts, same relief, and same concerns as double jeopardy issues, interlocutory appeal of all issues was permitted).

2. ASSETS SEIZURE OR RESTRAINT

An order restraining defendant from disposing of corporate property during pendency of proceedings under RICO indictment, and requiring defendant to post a performance bond to engage in the ordinary course of business, is an appealable collateral order. *See* *United States v. Spilotro*, 680 F.2d 612, 615 (9th Cir. 1982). *But see* *United States v. Roth*, 912 F.2d 1131, 1133 (9th Cir. 1990) (discussing government challenge to *Spilotro's* reliance on collateral order doctrine, but declining to address issue because order restraining assets appealable under 28 U.S.C. § 1292(a)(1)).

An order denying a motion to compel release of seized funds subject to civil forfeiture for the purposes of retaining counsel is not an appealable collateral order. See *United States v. Consiglio*, 866 F.2d 310, 311 (9th Cir. 1989).

At the time of the filing of an appeal from an order denying motion for return of property, there is appellate jurisdiction because the order is a final, appealable order; nonetheless, jurisdiction is lost, and the appeal must be dismissed, whenever an indictment is returned. *Bridges v. United States*, 237 F.3d 1039, 1040-41 (9th Cir. 2001).

3. BAIL DECISION

a. Pretrial Bail

An order denying a pretrial motion to reduce bail as excessive under the Eighth Amendment is an appealable collateral order. See *Stack v. Boyle*, 342 U.S. 1, 6 (1951).

To seek review of pretrial bail, defendants should first move the district court to reduce bail. *See* *Cohen v. United States*, 283 F.2d 50, 50 (9th Cir. 1960) (per curiam) (dismissing appeal without prejudice where defendant failed to first move district court to reduce bail); *cf.* *United States v. Kolek*, 728 F.2d 1280, 1281 (9th Cir. 1984) (court of appeals lacked jurisdiction over defendant's request for a reduction of bail pending trial because court exercises appellate, not original, jurisdiction over prejudgment bail matters).

> *Cross-reference*: VIII.J.4 (regarding convictions mooting preconviction bail issues).

b. Bail Pending Appeal by Federal Defendants

A party entitled to do so may obtain review of a district court order regarding release after a judgment of conviction by filing a notice of appeal from that order in the district court, or by filing a motion in the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Fed. R. App. P. 9(b).

Where the federal defendant's appeal is pending, the request for bail pending appeal should be presented as a motion rather than an appeal. *See* *United States v. Zherebchevsky*, 849 F.2d 1256, 1256 (9th Cir. 1988) (dismissing as "filed in error" an appeal from district court order denying bail pending appeal from judgment of

conviction and construing brief filed in bail appeal as motion); *see also* *United States v. Metts*, 41 F.3d 1281, 1281-82 (9th Cir. 1995) (considering motion for bail pending appeal from district court's denial of collateral attack under Fed. R. Crim. P. 33 and 28 U.S.C. § 2255, after district court denied request for bail).

A defendant need not seek a reduction in the amount of bail pending appeal set by the district court before applying to the court of appeals for a reduction. *See* *Fernandez v. United States*, 314 F.2d 289, 290 (9th Cir. 1963) (per curiam).

c. Bail in Habeas Cases Brought by State Prisoners

An order denying bail pending a decision on a state prisoner's habeas petition is not appealable either as a final judgment or a collateral order. *Land v. Deeds*, 878 F.2d 318, 318 (9th Cir. 1989) (per curiam).

d. Bail in Extradition Cases

Extraditees may appeal the denial of bail by way of habeas corpus. *See* *United States v. Kirby (In re Requested Extradition of Kirby)*, 106 F.3d 855, 858 (9th Cir. 1996) (dictum).

e. Bail in Cases Concerning Revocation of Supervised Release or Probation

i. Bail Pending Disposition in District Court

An order setting conditions of bail pending a hearing to determine whether to revoke a convict's supervised release is appealable under the collateral order doctrine. *See* *United States v. Loya*, 23 F.3d 1529, 1530 n.1 (9th Cir. 1994).

ii. Bail Pending Appeal

Applications for bail pending appeal of an order revoking probation and imposing an additional term of incarceration may be made by motion to the court of appeals, at least where the district court has already denied bail. *See* *United States v. Bell*, 820 F.2d 980, 981 (9th Cir. 1987).

4. COMMITMENT ORDER

A commitment order entered pursuant to 18 U.S.C. § 4241(d) resulting in involuntary commitment and temporary incarceration is an immediately appealable collateral order. *See United States v. Friedman*, 366 F.3d 975, 979-80 (9th Cir. 2004).

5. CONSTITUTIONALITY OF DEATH PENALTY STATUTE

A pre-trial order declaring a death penalty provision constitutional is not an appealable collateral order. *See United States v. Harper*, 729 F.2d 1216, 1220-21 (9th Cir. 1984). Such an order may be reviewable, however, on a petition for writ of mandamus. *See id.* at 1221-24 (noting that government and defendant agreed that provision was unconstitutional).

6. DANGEROUSNESS HEARING UNDER 18 U.S.C. § 4246

An order refusing to schedule a dangerousness hearing under 18 U.S.C. § 4246 is not an appealable collateral order where either another district court would conduct the hearing or defendant could seek writ. *See United States v. Ohnick*, 803 F.2d 1485, 1487 (9th Cir. 1986).

7. DISCLOSURE OF FINANCIAL INFORMATION

An order rejecting defendant's request to submit financial information under seal or with immunity, and consequently denying appointment of counsel at public expense, is not an appealable collateral order. *See United States v. Hitchcock*, 992 F.2d 236, 238-39 (9th Cir. 1993) (per curiam).

8. DISCOVERY REQUESTS

Interlocutory appeals are appropriate for those discovery requests that seek information to establish a statutory or constitutional right not to be tried. *See United States v. Zone*, 403 F.3d 1101, 1107 (9th Cir. 2005).

9. DISMISSAL OF INDICTMENT

An order granting a government motion to dismiss an indictment in one jurisdiction following issuance of an indictment in another jurisdiction is not an appealable collateral order. *See* *Parr v. United States*, 351 U.S. 513, 519 (1956) (order was merely a step towards disposition on the merits and could be reviewed on appeal from final judgment).

The court of appeals does not have jurisdiction under the collateral order doctrine to review the district court's denial of a defendant's motion to dismiss the indictment based on the theory that his prosecution was barred by the McCarran-Ferguson Act because this theory is reviewable on appeal from a final judgment. *United States v. Pace*, 201 F.3d 1116, 1118-19 (9th Cir. 2000).

10. DISQUALIFICATION OF COUNSEL

An order granting disqualification of defense counsel is not an appealable collateral order. *See* *Flanagan v. United States*, 465 U.S. 259, 269 (1984); *United States v. Greger*, 657 F.2d 1109, 1112-13 (9th Cir. 1981).

An order refusing to disqualify government counsel is similarly unappealable. *See* *United States v. Leyva-Villalobos*, 872 F.2d 335, 335 (9th Cir. 1989).

The collateral order doctrine does not permit review of a district court order disqualifying an attorney from representing multiple targets of a grand jury investigation. *See* *Molus v. United States*, 182 F.3d 668, 671 (9th Cir. 1999).

11. DOUBLE JEOPARDY AND SUCCESSIVE PROSECUTION

a. Generally

A pretrial order denying a motion to dismiss an indictment on double jeopardy grounds is generally an appealable collateral order. *See* *Abney v. United States*, 431 U.S. 651, 659, 662 (1977); *United States v. Castillo-Basa*, 483 F.3d 890, 895 (9th Cir. 2007) (collateral estoppel); *United States v. Elliot*, 463 F.3d 858,

863-64 (9th Cir. 2006); *United States v. Stoddard*, 111 F.3d 1450, 1452 n.1 (9th Cir. 1997); *United States v. Hickey*, 367 F.3d 888, 890 (9th Cir. 1997) (order reinstating charges dismissed during trial pursuant to plea agreement, on grounds that defendants subsequently violated agreement, immediately appealable); *United States v. Figueroa-Soto*, 938 F.2d 1015, 1016 (9th Cir. 1991) (order denying motion to dismiss federal indictment arising from facts underlying prior state conviction immediately appealable).

A claim of double jeopardy is immediately appealable even though it requires the court of appeals to examine the sufficiency of the evidence presented at a prior trial. *See Richardson v. United States*, 468 U.S. 317, 322 (1984). However, an order rejecting a claim of double jeopardy is appealable only if the claim is at least colorable. *See id.*; *United States v. Bhatia*, No. 07-10424, — F.3d —, 2008 WL 4330554 *1-2 (9th Cir. Sept. 24, 2008); *United States v. Schemenauer*, 394 F.3d 746, 749-50 (9th Cir. 2005); *United States v. Hickey*, 367 F.3d 888, 892 (9th Cir. 2004) (no appellate jurisdiction if the double jeopardy claim is not colorable); *United States v. Guiterrez-Zamarano*, 23 F.3d 235, 238 n.4 (9th Cir. 1994); *United States v. Castiglione*, 876 F.2d 73, 75 (9th Cir. 1988). Moreover, an order denying a motion to dismiss on double jeopardy grounds a predicate act, but not an entire count, from an indictment is not an appealable collateral order. *See United States v. Witten*, 965 F.2d 774, 775-76 (9th Cir. 1992).

b. Double Punishment

An order denying a motion to dismiss an indictment on the ground that a criminal proceeding could result in double punishment is generally an appealable collateral order. *See United States v. Chick*, 61 F.3d 682, 684-86 (9th Cir. 1995) (rejecting government contention that claim of multiple punishment should be treated differently than claim of multiple prosecution for appealability purposes). *But cf. United States v. Washington*, 69 F.3d 401, 403-04 & n.1 (9th Cir. 1995) (concluding that where defendant fails to claim an interest in seized property, forfeiture of that property in a prior civil action does not constitute punishment, and an appeal from an order denying a double jeopardy claim on these grounds "will be frivolous and will not justify interlocutory review").

However, a double jeopardy claim is not ripe for review by the district court or the court of appeals where sentence has not yet been imposed in either of two

criminal prosecutions. *See* *United States v. McKinley*, 38 F.3d 428, 429-31 (9th Cir. 1994).

c. Res Judicata and Collateral Estoppel

An order denying a motion to dismiss an indictment based on res judicata or collateral estoppel arising from a prior criminal proceeding is an appealable collateral order because it implicates double jeopardy considerations. *See* *United States v. Bhatia*, No. 07-10424, — F.3d —, 2008 WL 4330554 *1-2 (9th Cir. Sept. 24, 2008) (res judicata and collateral estoppel); *United States v. Castillo-Basa*, 483 F.3d 890, 895 (9th Cir. 2007) (collateral estoppel); *United States v. Romeo*, 114 F.3d 141, 142 (9th Cir. 1997) (collateral estoppel); *United States v. Castiglione*, 876 F.2d 73, 75 (9th Cir. 1988) (res judicata); *see also* *United States v. Carbullido*, 307 F.3d 957, 961 (9th Cir. 2002) (collateral estoppel).

However, an order denying a motion to dismiss an indictment based on collateral estoppel arising from a prior civil suit is not an appealable collateral order. *See* *United States v. Heffner*, 85 F.3d 435, 439 (9th Cir. 1996); *see also* *United States v. Sears, Roebuck & Co.*, 647 F.2d 902, 904 (9th Cir. 1981) (order denying motion to dismiss indictment based on equitable estoppel not appealable collateral order where evidentiary hearing would be indistinguishable from trial on merits).

d. Successive Prosecution under 18 U.S.C. § 5032

An order denying a motion to dismiss under 18 U.S.C. § 5032, which bars "federal proceedings against a juvenile after a plea has been entered or any evidence taken in any court," is an appealable collateral order because it raises "substantially similar considerations as an appeal on double jeopardy grounds." *United States v. Juvenile Female*, 869 F.2d 458, 460 (9th Cir. 1989) (per curiam).

12. GRAND JURY IRREGULARITIES

Cross-reference: VIII.A.22 (regarding appeals from orders denying dismissal for prosecutorial misconduct); VIII.C.4 (regarding appeals from orders denying *Kastigar* hearings).

An order rejecting a claim for violation of the Grand Jury Clause of the Fifth Amendment is reviewable under the collateral order doctrine only where the claimed violation implicated the right not to be tried. *See* *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 802 (1989); *United States v. Shah*, 878 F.2d 272, 274 (9th Cir. 1989). "Only a defect so fundamental that it causes the grand jury to no longer be a grand jury, or the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried." *See* *Midland Asphalt Corp.*, 489 U.S. at 802.

The following orders, denying motion to dismiss an indictment for alleged grand jury irregularities, are not reviewable under the collateral order doctrine:

- Order denying motion to dismiss indictment for violation of the grand jury secrecy provisions of Fed. R. Crim. P. 6. *See* *id.*

- Order denying motion to dismiss indictment because grand jury witness improperly expressed an opinion. *See* *United States v. Moreno-Green*, 881 F.2d 680, 681 (9th Cir. 1989) (per curiam).

- Order denying motion to dismiss indictment because the evidence presented to the grand jury was not adequate and competent, i.e. it was hearsay evidence. *See* *United States v. Garner*, 632 F.2d 758, 765 (9th Cir. 1980).

- Order denying motion to dismiss indictment because the grand jury was "conducted by government lawyers who were improperly appointed." *United States v. Symms*, 960 F.2d 847, 849 (9th Cir. 1992).

13. IMMUNITY

Certain claims of constitutional immunity are subject to immediate appellate review. *See* *Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979) (order denying defendant's motion to dismiss indictment on ground that it was undermined by Speech or Debate Clause violations); *United States v. Claiborne*, 727 F.2d 842, 844 (9th Cir. 1984) (per curiam) (order denying defendant federal judge's motion

to dismiss indictment based on separation of powers principle and various constitutional provisions).

However, an order denying defendant's motion to dismiss an indictment on the grounds that he or she was granted transactional immunity by prosecutors is not an appealable collateral order. *See* *United States v. Dederich*, 825 F.2d 1317, 1321 (9th Cir. 1987) ("The guarantee afforded by the immunity can be adequately protected by appeal after conviction."), *vacated on other grounds by* *United States v. Benjamin*, 879 F.2d 676, 677 (9th Cir. 1989).

14. INDICTMENT CLAUSE VIOLATION

An order denying a motion to dismiss an information on the ground that the charged crimes are "infamous," so that under the indictment clause of the Fifth Amendment the government may proceed only by grand jury indictment, is an appealable collateral order. *See* *United States v. Yellow Freight Sys., Inc.*, 637 F.2d 1248, 1251 (9th Cir. 1980).

15. JURISDICTION OF DISTRICT COURT

A challenge to the district court's jurisdiction is generally not subject to interlocutory review. *See* *United States v. Saccoccia*, 18 F.3d 795, 800-01 & n.8 (9th Cir. 1994) (defendant claimed violations of extradition treaty precluded jurisdiction); *United States v. Layton*, 645 F.2d 681, 683-84 (9th Cir. 1981) (defendant claimed district court lacked jurisdiction because charging statute did not have extraterritorial effect).

16. JUVENILE PROSECUTED AS ADULT

An order transferring a juvenile for adult prosecution is an appealable collateral order. *See* *United States v. Juvenile Male*, 492 F.3d 1046, 1048 (9th Cir. 2007) (per curiam); *United States v. Gerald N.*, 900 F.2d 189, 190-91 (9th Cir. 1990) (per curiam); *United States v. Lynell N.*, 124 F.3d 1170, 1171 (9th Cir. 1997).

17. JUVENILE RIGHT TO SPEEDY TRIAL

An order denying a juvenile's right to a speedy trial is not subject to interlocutory review. *See* *United States v. Brandon P.*, 387 F.3d 969, 973 (9th Cir. 2004).

18. LACK OF FAIR WARNING

A district court's denial of a defendant prison guard's motion to dismiss the charge on the basis that he did not have fair warning that shooting of prisoner during altercation with fellow inmate was proscribed conduct under statute was not subject to interlocutory review under collateral order doctrine. *United States v. Lewis*, 368 F.3d 1102, 1105-06 (9th Cir. 2004).

19. PLEA AGREEMENT BREACH

An order reinstating charges dismissed during trial pursuant to plea agreement is an appealable collateral order on the grounds of double jeopardy and breach of plea agreement where the breach claim is "based on the identical facts and seek[s] the identical relief" as the double jeopardy claim. *United States v. Sandoval-Lopez*, 122 F.3d 797, 799-800 (9th Cir. 1997).

However, an order rejecting defendant's claim that prosecution breached plea agreement is not an appealable collateral order where the breach claim is "not strictly based upon the Double Jeopardy Clause." *United States v. Solano*, 605 F.2d 1141, 1142-43 (9th Cir. 1979) (government allegedly agreed not to prosecute certain offenses in exchange for guilty pleas as to other offenses).

20. PRIMARY JURISDICTION DOCTRINE

An order denying a motion to dismiss under the primary jurisdiction doctrine, and to refer action to administrative agency, is not an appealable collateral order. *See* *United States v. Almany*, 872 F.2d 924, 925 (9th Cir. 1989).

21. PROBABLE CAUSE DETERMINATION

An order denying motion to dismiss information due to lack of probable cause determination is not an appealable collateral order where defendant is not restrained pending trial. *See* *United States v. Yellow Freight Sys., Inc.*, 637 F.2d 1248, 1252-53 (9th Cir. 1980).

22. PROSECUTORIAL MISCONDUCT

Cross-reference: VIII.A.12 (regarding appeals from orders denying dismissal for grand jury irregularities).

a. Generally

An order denying a motion to dismiss an indictment based on prosecutorial misconduct is not an appealable collateral order. *See* *United States v. Sherlock*, 887 F.2d 971, 972-73 (9th Cir. 1989) (alleged misconduct arose from presentation of false testimony and failure to present exculpatory evidence before grand jury); *United States v. Taylor*, 881 F.2d 840, 842-44 (9th Cir. 1989) (alleged misconduct arose from setting a "perjury trap" during grand jury proceedings by recalling the same witness several times and reasking the same questions); *United States v. Moreno-Green*, 881 F.2d 680, 681-84 (9th Cir. 1989) (per curiam) (alleged misconduct arose from improper presentation of evidence, failure to present exculpatory evidence, improper reference to defendants' assertion of rights, and improper testimony by prosecutor during grand jury proceedings); *United States v. Shah*, 878 F.2d 272, 273-75 (9th Cir. 1989) (alleged misconduct arose from Fifth and Sixth Amendment violations, failure to disclose evidence impeaching grand jury witnesses, and grand jury secrecy violations); *United States v. Schiff*, 874 F.2d 705, 706 (9th Cir. 1989) (alleged misconduct based on allegation that "the government engaged in 'privilege harassment' by subpoenaing [defendant] to testify before the grand jury knowing she would invoke her Fifth Amendment privilege").

b. Vindictive or Selective Prosecution

An order denying a motion to dismiss an indictment for vindictive or selective prosecution is not an appealable collateral order. *See* *United States v.*

Hollywood Motor Car Co., 458 U.S. 263, 264-65, 270 (1982) (per curiam) (vindictive prosecution); *United States v. McKinley*, 38 F.3d 428, 431 (9th Cir. 1994) (same); *see also United States v. Moreno-Green*, 881 F.2d 680, 681 (9th Cir. 1989) (per curiam) (vindictive prosecution claim arising from government's presentation of case to grand jury); *United States v. Claiborne*, 727 F.2d 842, 849 (9th Cir. 1984) (per curiam) (vindictive and selective prosecution claims raised by defendant federal judge); *United States v. Butterworth*, 693 F.2d 99, 101 (9th Cir. 1982) (selective prosecution).

23. RES JUDICATA AND COLLATERAL ESTOPPEL

See VIII.A.11 (Double Jeopardy and Selective Prosecution).

24. RETURN OF PROPERTY

See VIII.A.29 (Suppression of Evidence or Return of Property).

25. SHACKLING ORDER

A district court's review of a district-wide policy requiring pretrial detainees to be shackled when making their first appearance before a magistrate judge is immediately appealable. *See United States v. Howard*, 480 F.3d 1005, 1011 (9th Cir. 2007).

26. SPEEDY TRIAL RIGHTS

a. Sixth Amendment

An order denying motion to dismiss an indictment based on a violation of defendant's Sixth Amendment right to a speedy trial is not an appealable collateral order. *See United States v. MacDonald*, 435 U.S. 850, 857, 861 (1978).

b. Speedy Trial Act

An order denying a motion to dismiss an indictment based on a Speedy Trial Act violation is not an appealable collateral order. *See United States v. Mehrmanesh*, 625 F.2d 766, 768-70 (9th Cir. 1980).

c. Interstate Agreement on Detainers Act

An order denying a motion to dismiss for violations of the Interstate Agreement on Detainers Act is not an appealable collateral order. *See United States v. Cejas*, 817 F.2d 595, 596 (9th Cir. 1987); *see also United States v. Ford*, 961 F.2d 150, 151 (9th Cir. 1992) (per curiam) (order dismissing first indictment without prejudice due to violation of speedy trial provision of Interstate Agreement on Detainers Act not appealable by defendant after he pleaded guilty to subsequent indictment).

27. STATUTE OF LIMITATIONS

An order denying a motion to dismiss an indictment as time barred is not an appealable collateral order. *See United States v. Rossman*, 940 F.2d 535, 536 (9th Cir. 1991) (per curiam).

28. SUFFICIENCY OF INDICTMENT

An order denying a motion to dismiss an indictment for failure to state an offense is not an appealable collateral order. *See Abney v. United States*, 431 U.S. 651, 663 (1977).

29. SUPPRESSION OF EVIDENCE OR RETURN OF PROPERTY

a. Generally

An order denying a motion to suppress evidence is not an appealable collateral order if criminal proceedings are pending at the time of the order. *See United States v. Storage Spaces Designated Nos. "8" & "49"*, 777 F.2d 1363, 1365 (9th Cir. 1985); *see also United States v. Carnes*, 618 F.2d 68, 70 (9th Cir. 1980) (order denying motion to strike testimony offered during previous mistrial not immediately appealable).

An order denying a motion for return of property is also unappealable "unless the motion for return of property is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant." *DeMassa v.*

Nunez, 747 F.2d 1283, 1286 (9th Cir. 1984) (internal quotation marks and citation omitted), *on rehearing*, 770 F.2d 1505 (9th Cir. 1985); *see also Andersen v. United States*, 298 F.3d 804, 808 (9th Cir. 2002). Where no criminal proceedings are pending against the movant, an order denying the return of property is a final appealable order. *See Does I-IV v. United States (In re Grand Jury Subpoenas Dated December 10, 1987)*, 926 F.2d 847, 855 (9th Cir. 1991); *United States v. Martinson*, 809 F.2d 1364, 1367 (9th Cir. 1987).

"[I]t is the pendency of the criminal action[] that is the determining factor, not the form of motion" as either a motion to suppress or a motion for returning of property. *DeMassa v. Nunez*, 747 F.2d 1283, 1286 (9th Cir. 1984).

b. Criminal Proceedings Pending

Criminal proceedings are pending "[w]hen at the time of ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment." *United States v. Storage Spaces Designated Nos. "8" & "49"*, 777 F.2d 1363, 1365 (9th Cir. 1985) (internal quotation marks and citation omitted); *see also DeMassa v. Nunez*, 747 F.2d 1283, 1287 (9th Cir. 1984) (noting that Ninth Circuit has adopted a liberal definition of when a criminal proceeding is pending), *on rehearing*, 770 F.2d 1505 (9th Cir. 1985).

Criminal proceedings are also pending where a grand jury investigation is ongoing. *See id.*; *Church of Scientology v. United States*, 591 F.2d 533, 536-37 (9th Cir. 1979); *see also Meier v. Keller*, 521 F.2d 548, 556 (9th Cir. 1975) (presenting made to grand jury at time of order).

30. TRANSFER

An order transferring a criminal case back to transferor court after entry of not guilty plea is not an appealable collateral order. *See United States v. French*, 787 F.2d 1381, 1383 (9th Cir. 1986).

B. APPEAL BY GOVERNMENT (28 U.S.C. § 1291, 18 U.S.C. § 3731)

1. STATUTORY AUTHORITY

a. Generally

Generally, the court of appeals has jurisdiction over a government appeal in a criminal case if the appeal is authorized under 18 U.S.C. § 3731 and the order being appealed constitutes a final judgment under 28 U.S.C. § 1291. *See United States v. Russell*, 804 F.2d 571, 573 (9th Cir. 1986); *United States v. Cote*, 51 F.3d 178, 180 (9th Cir. 1995); *see also United States v. Woodruff*, 50 F.3d 673, 675 (9th Cir. 1995) (internal quotations and citation omitted).

b. 18 U.S.C. § 3731

On its face, 18 U.S.C. § 3731 permits the government to appeal from "a district court's order dismissing a criminal prosecution, granting a new trial, or suppressing evidence, except where such an appeal would violate the double jeopardy clause, or releasing a charged or convicted defendant." *United States v. Sweeney*, 914 F.2d 1260, 1261-62 (9th Cir. 1990).

However, "government appeals are not restricted to § 3731's specific categories." *Id.*; *United States v. Edmonson*, 792 F.2d 1492, 1496 (9th Cir. 1986); *see also United States v. Hetrick*, 644 F.2d 752, 755 (9th Cir. 1980) (noting that previous decisions suggesting that government appeals are restricted to the specific categories listed in § 3731 have been superseded by Supreme Court precedent).

Section 3731 is "intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit," so that the relevant inquiry turns on the reach of the Double Jeopardy Clause. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977) (internal quotations and citations omitted); *see also United States v. Stanton*, 501 F.3d 1093, 1097-99 (9th Cir. 2007).

c. 28 U.S.C. § 1291

"Despite the general application of § 1291's finality requirement, § 3731 can, and does, make it lawful for the government to take certain appeals even though

there is no final judgment." *United States v. Woodruff*, 50 F.3d 673, 675 (9th Cir. 1995) (internal quotations and citation omitted).

Appeals from interlocutory orders have been permitted where § 3731 expressly provides for such an appeal. *See United States v. Russell*, 804 F.2d 571, 573 (9th Cir. 1986).

d. Appeal by State Government

i. Order Denying Remand

An order denying a state's motion to remand to state court a removed criminal action is not subject to interlocutory appeal, but may be reviewed on petition for writ of mandamus. *California v. Mesa*, 813 F.2d 960, 962-64 (9th Cir. 1987) (interlocutory appeal inappropriate because of delicate issue of federal-state relations, inadequacy of appeal to vindicate state rights, and need to address "new and important problems"), *aff'd by* 489 U.S. 121 (1989).

ii. Other Orders

In a criminal action removed to federal court, the state government is authorized to appeal under 28 U.S.C. § 1291 whenever the state would be authorized to appeal under state law. *See Arizona v. Manypenny*, 451 U.S. 232, 248-50 (1981); *see also Arizona v. Elmer*, 21 F.3d 331, 333 n.1 (9th Cir. 1994) (state permitted to appeal pretrial order suppressing evidence because state law recognized right to appeal); *cf. Guam v. Okada*, 694 F.2d 565, 567 n.3 (9th Cir. 1982) ("[S]ection 3731 does not authorize appeals by prosecuting entities such as states and territorial governments."), *amended by* 715 F.2d 1347 (9th Cir. 1983).

2. ORDER GRANTING DISMISSAL, NEW TRIAL, OR ACQUITTAL

Under 18 U.S.C. § 3731, the government may appeal from "a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to one or more counts," as long as the Double Jeopardy Clause would not be offended. 18 U.S.C. § 3731.

a. Generally

i. Order of Dismissal

The government generally may appeal the pretrial dismissal of an indictment. *See* *Serfass v. United States*, 420 U.S. 377, 394 (1975); *United States v. Chapman*, 524 F.3d 1073, 1080 (9th Cir. 2008); *see also* *United States v. Schwartz*, 785 F.2d 673, 678-79 (9th Cir. 1986) (government could appeal dismissal of indictment against defendant who, prior to trial, pleaded guilty and was then granted withdrawal of guilty plea and dismissal of indictment after co-defendants were acquitted at trial).

The government's authority to appeal from dismissals of indictments under § 3731 extends to dismissals without prejudice. *See* *United States v. Woodruff*, 50 F.3d 673, 675 (9th Cir. 1995). Moreover, the government may appeal the dismissal of less than all counts in an indictment under §3731, although the order is not final. *See* *United States v. Russell*, 804 F.2d 571, 573 (9th Cir. 1986); *United States v. Marubeni Am. Corp.*, 611 F.2d 763, 764-65 (9th Cir. 1980).

ii. Order Tantamount to Dismissal

An order tantamount to dismissal of an indictment is appealable under § 3731. *See* *United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995) (regarding district court's refusal to set case for retrial following reversal of convictions); *United States v. Lee*, 786 F.2d 951, 955-56 (9th Cir. 1986) (regarding magistrate judge's order "remanding" misdemeanor charges for disposition by Air Force).

iii. Order Granting New Trial

The government may appeal from an order granting a new trial following a guilty verdict. *See* *United States v. Smith*, 832 F.2d 1167, 1168 (9th Cir. 1987); *United States v. Shaffer*, 789 F.2d 682, 686 (9th Cir. 1986).

iv. Acquittal

A verdict of acquittal cannot be reviewed without violating the Double Jeopardy Clause. *See* *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

However, a judgment of acquittal entered after a jury returns a guilty verdict may be appealable under certain circumstances. *See* *United States v. Bailey*, 41 F.3d 413, 415 (9th Cir. 1994) (order appealable under § 1291 although § 3731 does not expressly provide for such appeals).

b. Double Jeopardy Limitations

i. Generally

The Double Jeopardy Clause bars a government appeal where: (1) jeopardy attached prior to the attempted appeal; (2) defendant was "acquitted;" and (3) reversal on appeal would require further proceedings to resolve factual issues going to the elements of the offense charged. *See* *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570-72, 575 (1977); *United States v. Scott*, 437 U.S. 82, 101 (1978); *see also* *United States v. Affinito*, 873 F.2d 1261, 1263-64 (9th Cir. 1989) ("The Double Jeopardy Clause bars further prosecution when the court enters a judgment of acquittal and reversal [would] necessitate[] a new trial.").

ii. Attachment of Jeopardy

The government may appeal where jeopardy has not yet attached. *See* *Serfass v. United States*, 420 U.S. 377, 394 (1975). "[J]eopardy attaches when a jury is empaneled and sworn, or, in a bench trial, when the judge begins to receive evidence." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977).

Ordinarily, jeopardy does not attach at a pretrial hearing even though evidence is considered. *See* *Serfass*, 420 U.S. at 389-90, 392 (1975) (no jeopardy attached even though evidence outside indictment considered on motion to dismiss where trial would not assist determination of issue and defendant's jury request precluded court from finding defendant guilty); *United States v. Olson*, 751 F.2d 1126, 1128 (9th Cir. 1985) (per curiam) (no jeopardy attached even though a government proffered evidence in opposition to motion to dismiss because no witnesses were sworn and defendant faced no risk of being found guilty); *United States v. Choate*, 527 F.2d 748, 751 (9th Cir. 1975) (no jeopardy attached even though district court accepted two factual stipulations prior to granting motion to dismiss indictment where stipulations were unrelated to motion and parties understood stipulations would not trigger jeopardy);

However, jeopardy may attach before a formal trial begins. *See* *United States v. Patrick*, 532 F.2d 142, 146 (9th Cir. 1976) (defendant placed in jeopardy where district court heard defendant's proffer of evidence and government's admission regarding a necessity defense, found the defense available, and concluded defendant was not guilty); *United States v. Hill*, 473 F.2d 759, 761 (9th Cir. 1972) (defendants placed in jeopardy where after receiving evidence on defendants' pretrial motions to dismiss, the district court determined that as a matter of law, an element of the offense was lacking, i.e., the materials were not obscene).

iii. "Acquittal" of Defendant

(a) "Acquittal" Defined

"A defendant is acquitted . . . when the judge's ruling, whatever its label, actually represents a resolution in defendant's favor, correct or not, of some or all of the factual elements of the charged offense." *United States v. Miller*, 4 F.3d 792, 794 (9th Cir. 1993) (internal quotation marks and citation omitted); *accord* *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

"[A]ppellate courts perform an independent inquiry to insure that the district court's order was a true acquittal as evidenced by a legal evaluation of the government's case." *United States v. Affinito*, 873 F.2d 1261, 1264 (9th Cir. 1989) (internal quotation marks and citation omitted). *But cf.* *United States v. Seley*, 957 F.2d 717, 719-20 (9th Cir. 1992) (district court's order was "clearly framed as a dismissal" and would not be considered an acquittal where court had authority to enter an acquittal but did not do so).

(b) Acquittal by Judge Rather than Jury

A judgment of acquittal due to insufficient evidence under Fed. R. Crim. P. 29(c), entered by the district court before a jury returns a verdict, has the same preclusive effect as a jury verdict of acquittal. *See* *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570-75 (1977) (noting that appeal is barred only when "it is plain that the District Court . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction"); *cf.* *United States v. Stanton*, 501 F.3d 1093, 1099 (9th Cir. 2007) (holding that the

government may appeal where, pursuant to Rule 29, district court either reverses a conviction entered by a magistrate judge or affirms a magistrate's judgment of acquittal after a jury verdict of guilty).

(c) Erroneous Acquittal

The preclusive effect of a judgment of acquittal is the same, "however, erroneous." *Sanabria v. United States*, 437 U.S. 54, 69 (1978); *see also United States v. Castillo-Basa*, 483 F.3d 890, 899-900 (9th Cir. 2007) ("Collateral estoppel applies when the jury resolves, in a manner adverse to the government, an issue that the government would be required to prove in order to obtain a . . . conviction at the second trial."); *United States v. Miller*, 4 F.3d 792, 794 (9th Cir. 1993). *But cf. United States v. United States Dist. Court*, 858 F.2d 534, 537 (9th Cir. 1988) (prior to acquittal government may be able to seek writ relief from order that is not immediately appealable, e.g. order denying government motion to suppress evidence as to proposed criminal defense).

(d) Acquittal Based on Suppression of Evidence

An acquittal based on an erroneous suppression of evidence has the same preclusive effect as other acquittals. *See Sanabria v. United States*, 437 U.S. 54, 68-69 (1978) (no appeal permitted where district court excluded certain evidence and then granted pre-verdict judgment of acquittal based on insufficient evidence); *see also United States v. Ember*, 726 F.2d 522, 524-25 (9th Cir. 1984); *United States v. Govro*, 833 F.2d 135, 137 (9th Cir. 1987); *United States v. Baptiste*, 832 F.2d 1173, 1175 (9th Cir. 1987). *But cf. United States v. Seley*, 957 F.2d 717, 719-20 (9th Cir. 1992) (appeal permitted where district court ruled certain evidence inadmissible at retrial and then dismissed indictment with prejudice due to insufficient evidence to convict; order was "clearly framed as a dismissal" even though court had authority to enter an acquittal).

(e) Acquittal Based on Stipulated or Undisputed Facts

An acquittal based on stipulated or undisputed facts has the same preclusive effect as other acquittals. *See Finch v. United States*, 433 U.S. 676, 677 (1977)

(per curiam) (government could not appeal from dismissal based on agreed statement of facts); *see also* *United States v. Sisson*, 399 U.S. 267, 286-87 (1970) (portion of opinion in which four justices joined, three dissented, and two did not participate) (government could not appeal under former version of § 3731 even though it did not dispute findings made by the district court following trial).

(f) Dismissal Having Effect of Acquittal

"[W]here the defendant himself seeks to have [a] trial terminated without any submission to either judge or jury as to his guilt or innocence, an appeal by the Government from his successful effort to do so is not barred." *United States v. Scott*, 437 U.S. 82, 101 (1978) (permitting government appeal from a midtrial dismissal based on prejudicial preindictment delay).

However, the rule in *Scott* "clearly contemplates a significant level of participation by the defendant on the merits." *United States v. Dahlstrum*, 655 F.2d 971, 974-76 (9th Cir. 1981) (although unclear from record whether judge resolved any factual elements of charged offenses, government not permitted to appeal from order of acquittal following court's investigation of government misconduct where judge initiated investigation and defendant did not seek to avoid a decision by the trier of fact); *see also* *United States v. Govro*, 833 F.2d 135, 137 (9th Cir. 1987) (appeal from judgment of acquittal barred because, although magistrate judge "refused to consider any of the government's evidence," and entered judgment on what was apparently a defense, termination of the case was sua sponte and not at defendant's election).

(g) Dismissals That Are Not Acquittals

The government has been permitted to appeal an order of dismissal in the following situations:

- District court aborted trial after jury impaneled so that witnesses could consult attorneys before testifying, and then dismissed information prior to retrial; court "clearly contemplated reprosecution" when it declared a mistrial and it dismissed the information on double jeopardy grounds "without further explanation." *United States v. Jorn*, 400 U.S. 470, 478 n.7 (1971) (plurality opinion); *but see* *United*

States v. Chapman, 524 F.3d 1073, 1082 n.3 (9th Cir. 2008) (noting conflicting Supreme Court precedent).

- District court "acquitted" defendant "on constitutional grounds arising from the unavailability of potential material witnesses" before the government had rested and the record did not "plainly demonstrate that the district court evaluated the government's evidence and determined that it was legally insufficient to sustain a conviction." *United States v. Gonzales*, 617 F.2d 1358, 1362 (9th Cir. 1980) (per curiam).

- Four months after a hung jury resulted in a mistrial, the district court granted defendant's motion to dismiss the indictment before retrial had commenced. *See United States v. Stanford*, 429 U.S. 14, 16 (1976) (per curiam); *cf. United States v. Martin Linen Supply Co.*, 430 U.S. 564, 575-76 (1977) (emphasizing that no judgment of acquittal was entered following mistrial in *Stanford*).

- After a hung jury resulted in a partial mistrial, the district court conducted a written jury poll and dismissed counts on which less than a majority of jurors had voted to convict, because "there [was] no indication that the district court resolved any factual issues, or based its holding on the weight of the evidence." *United States v. Miller*, 4 F.3d 792, 794 (9th Cir. 1993).

- Dismissal followed mistrial due to prosecutorial misconduct. *See United States v. Jacobs*, 855 F.2d 652, 654-55 (9th Cir. 1988) (per curiam) ("When a defendant moves for a mistrial, double jeopardy attaches only where the prosecutor intended to 'goad' the defendant into making a mistrial motion.").

- Order dismissing mistried count was "clearly framed as a dismissal" and jeopardy had not terminated following first trial. *United States v. Seley*, 957 F.2d 717, 719-20 (9th Cir. 1992).

- Judgment of acquittal was not entered due to insufficient evidence, but to permit court of appeals to determine impact of intervening

Supreme Court decision on guilty verdicts. *See* *United States v. Affinito*, 873 F.2d 1261, 1264 (9th Cir. 1989).

c. Further Factual Proceedings Necessary

i. General Rule

Where reversal on appeal would not necessitate further proceedings to resolve factual issues going to the elements of the charged offense, appeal is not barred. *See* *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570-71 (1977).

Thus, where the district court enters a judgment of acquittal after a finding of guilt by the trier of fact, the government may appeal because reversal would merely reinstate the finding of guilt. *See* *United States v. Wilson*, 420 U.S. 332, 344-45, 352-53 (1975) (appellate review in such a case "does not offend the policy against multiple prosecution").

Government appeals have been permitted under *Wilson* in the following cases: *United States v. Ceccolini*, 435 U.S. 268, 270-71 (1978) (after finding defendant guilty at bench trial, district court granted defendant's motion to suppress evidence and to set aside verdict for insufficient evidence); *United States v. Morrison*, 429 U.S. 1, 4 (1976) (per curiam) (to same effect); *United States v. Stanton*, 501 F.3d 1093, 1098 (9th Cir. 2007) (after magistrate judge found defendant guilty, district court reversed on insufficiency of evidence grounds); *United States v. Ching Tang Lo*, 447 F.3d 1212, 1220 (9th Cir. 2006) (after jury found defendant guilty, district court granted judgment of acquittal with respect to two of five counts); *United States v. Martinez*, 122 F.3d 1161, 1163 (9th Cir. 1997) (after jury found defendant guilty, district court granted judgment of acquittal under Rule 29(c) or, alternatively, a new trial); *United States v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206, 1208 n.4 (9th Cir. 1992) (after jury found defendant guilty, district court granted judgment of acquittal).

ii. Need for Formal Finding of Guilt

Appeal is not permitted under *Wilson* unless the trier of fact has made a formal finding of guilt. *See* *Finch v. United States*, 433 U.S. 676, 677 (1977) (per

curiam) (appeal not permitted because no formal finding of guilt that could be reinstated upon reversal, i.e., no plea of guilty or nolo contendere, or a verdict or general finding of guilt by court); *see also* *United States v. Jenkins*, 420 U.S. 358, 367-68 (1975) (no general finding of guilt that could be reinstated upon "dismissal" of indictment where district court findings of fact after bench trial did not clearly find against defendant on all necessary issues), *overruled on other grounds,* *United States v. Scott*, 437 U.S. 82, 101 (1978).

In the absence of a formal finding of guilt, appeal is not permitted under *Wilson* even where the case was submitted on stipulated facts or the government does not dispute facts found by the district court. *See* *Finch v. United States*, 433 U.S. 676, 677 (1977) (per curiam) (agreed statements of facts); *cf.* *United States v. Sisson*, 399 U.S. 267, 286-87 (1970) (portion of opinion in which four justices joined, three dissented, and two did not participate) (factual findings not disputed).

d. Scope of Double Jeopardy Bar

i. Alternative Theories of Liability

Where the Double Jeopardy Clause bars a government appeal, the bar extends to the government's theories of liability that the district court removed from the case before the acquittal, at least where the court did not modify the indictment and the government had agreed that acquittal referred to the entire count. *See* *Sanabria v. United States*, 437 U.S. 54, 65-68, 70-72 (1978); *United States v. Schwartz*, 785 F.2d 673, 677-78 (9th Cir. 1986).

ii. Separate Counts

A bar to appealing one count does not necessarily extend to other counts. *See* *United States v. Sharif*, 817 F.2d 1375, 1376 (9th Cir. 1987) (where district court found insufficient evidence of conspiracy after jury hung as to that count, and court consequently set aside guilty verdicts on three other counts, government could appeal latter ruling on grounds that former ruling was incorrect even though acquittal on conspiracy charge itself probably unappealable).

e. Use of Mandamus to Avoid Double Jeopardy Bar

Where the criteria for barring a government appeal under the Double Jeopardy Clause have already been met, the government may not avoid the bar by petitioning for a writ of mandamus, at least where defendants have not waived the double jeopardy defense. *See* *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam); *United States v. Ember*, 726 F.2d 522, 525 n.7 (9th Cir. 1984); *United States v. Hill*, 473 F.2d 759, 763-64 (9th Cir. 1972).

However, prior to an acquittal the government may be able to seek writ review of decision related to trial that are not otherwise immediately appealable. *See* *United States v. W. R. Grace*, 504 F.3d 745, 757-58 (9th Cir. 2007) (reviewing defendants' proffered affirmative defense); *United States v. United States Dist. Court*, 858 F.2d 534, 537 (9th Cir. 1988) (reviewing pretrial order denying government motion to exclude certain evidence, and stating that "government's claim that the district court has permitted an inappropriate criminal defense presents a paradigmatic case for mandamus").

3. ORDER SUPPRESSING/EXCLUDING EVIDENCE OR REQUIRING RETURN OF SEIZED PROPERTY

a. Generally

Under 18 U.S.C. § 3731, the government may appeal from "a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding [if the order is] not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, [and] if the United States Attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding." 18 U.S.C. § 3731; *see also* *United States v. McKoy*, 78 F.3d 446, 449 (9th Cir. 1996) (suppression order).

b. Provision Broadly Interpreted

The statute permitting government appeals from suppression orders is interpreted broadly. *See* *United States v. Humphries*, 636 F.2d 1172, 1175 (9th Cir. 1980) (stating that the court focuses on "the effect of the order sought to be

appealed"); *see also* 18 U.S.C. § 3731 ("The provisions of this section shall be liberally construed to effectuate its purposes.").

Appeals from orders affecting the government's ability to admit evidence at trial have been permitted in the following cases:

- Pretrial order restricting evidence presentable at trial was appealable even though order was general and failed to analyze each category of evidence on which government sought rulings. *See United States v. Helstoski*, 442 U.S. 477, 487 n.6 (1979).

- Suppression order appealable even though based on Fed. R. Evid. 404(b) grounds rather than on constitutional grounds. *See United States v. Adrian*, 978 F.2d 486, 489-90 (9th Cir. 1992), *overruled in part on other grounds by United States v. W.R. Grace*, 526 F.3d 499, 506 (9th Cir. 2008) (en banc).

- Order that government supply certain information to defendants appealable where order stated failure to comply would preclude witnesses from testifying, the government declined to comply, and the district court refused to issue a suppression order at government's request. *See United States v. Dominguez-Villa*, 954 F.2d 562, 564-65 (9th Cir. 1992).

- Order granting defendants' motion to exclude witness from testifying appealable, although the witness–who just became available–was not included on the government's list of witnesses submitted under prior court order. *See United States v. Schwartz*, 857 F.2d 655, 657 (9th Cir. 1988).

- Order quashing subpoena. *See United States v. Hirsch (In re Grand Jury Subpoena)*, 803 F.2d 493, 495 (9th Cir. 1986), *corrected*, 817 F.2d 64 (9th Cir. 1987).

- Order denying government motion to admit at second trial evidence excluded from mistrial. *See United States v. Layton*, 720 F.2d 548, 554 (9th Cir. 1983).

- Order denying government "Motion to Determine the Admissibility of Evidence" made after district court issued confusing order granting defendant's motion to suppress. *See* *United States v. Humphries*, 636 F.2d 1172, 1175-77 (9th Cir. 1980).

- Order excluding evidence and witness testimony where government failed to comply with district court orders to disclose such evidence to defendants, even though Attorney General merely certified the appeal without providing substantial proof in support of the excluded evidence. *See* *United States v. W.R. Grace*, 526 F.3d 499, 508 (9th Cir. 2008) (en banc).

- Order granting defendants' motion to suppress evidence for violation of the Fourth Amendment. *See* *United States v. Turvin*, 517 F.3d 1097, 1098 (9th Cir. 2008).

But cf. *United States v. Barker*, 1 F.3d 957, 958-59 (9th Cir. 1993) (questioning whether appellate jurisdiction exists under 18 U.S.C. § 3731 over an order splitting elements of a crime into two parts for purposes of trial as the issue "is not truly one of exclusion of evidence," and analyzing case as a writ petition).

c. Certification Requirement

i. Generally

Where the right to appeal under § 3731 is contingent upon certification, the certification requirement is met where a United States Attorney certifies that the appeal is not taken for the purpose of delay and that the evidence is a substantial proof of a material fact in the proceeding. *See* *United States v. W.R. Grace*, 526 F.3d 499, 506 (9th Cir. 2008) (en banc).

ii. No Purpose of Delay

Certification by a United States Attorney is sufficient to fulfill the government's burden of establishing that an appeal was not filed for the purpose of

delay. *See* *United States v. W.R. Grace*, 526 F.3d 499, 506 (9th Cir. 2008) (en banc).

iii. "Substantial Proof of a Fact Material"

Certification by a United States Attorney is sufficient to fulfill the government's burden of establishing that the evidence is substantial proof of a material fact. *See* *United States v. W.R. Grace*, 526 F.3d 499, 506 (9th Cir. 2008) (en banc). *Grace* overruled prior case law requiring a showing that "a reasonable trier of fact could find the evidence persuasive in establishing the proposition for which the government seeks to admit it." *United States v. Adrian*, 978 F.2d 486, 490-91 (9th Cir. 1992), *overruled in part by W.R. Grace*, 526 F.3d at 506.

iv. Timing of Certification

The government's delay in filing the certificate required under § 3731 does not rise to jurisdictional dimensions. *See* *United States v. Becker*, 929 F.2d 442, 445 (9th Cir. 1991) (government permitted to file certificate after oral argument on appeal where defendant was not prejudiced and defendant failed to raise omission until oral argument); *United States v. Eccles*, 850 F.2d 1357, 1359 (9th Cir. 1988) (appeal permitted even though government did not file certificate with district court until after oral argument on appeal); *see also* *United States v. Wallace*, 213 F.3d 1216, 1219 (9th Cir. 2000) (late filing of a § 3731 certificate does not automatically invalidate it); *United States v. Juvenile Male*, 241 F.3d 684, 687 (9th Cir. 2001) ("noncompliance with § 3731 is not a jurisdictional bar to bringing an interlocutory appeal."); *but see* *United States v. W.R. Grace*, 526 F.3d 499, 506-07 & n.4 (9th Cir. 2008) (en banc) (noting that courts retain discretion to impose sanctions for untimely certificate filing as a means of ensuring defendants are not disadvantaged); *United States v. McNeil*, 484 F.3d 301, 306-310 (9th Cir. 2007) (holding that sanctions for untimely certificate filing remain within the discretion of the court, including dismissal of the appeal in extreme circumstances).

d. Double Jeopardy Limitation

Under § 3731, an order suppressing or excluding evidence is appealable if it is not made after jeopardy attaches and before a verdict. *See* 18 U.S.C. § 3731.

Thus, following a mistrial the government may appeal from an order denying a motion to admit evidence at the second trial that was excluded from the first trial. *See* *United States v. Layton*, 720 F.2d 548, 554 (9th Cir. 1983). Moreover, the government may appeal from judgments of acquittal entered after a finding of guilt and subsequent suppression of evidence. *See* *United States v. Ceccolini*, 435 U.S. 268, 270-71 (1978) (after district court found defendant guilty at bench trial and court subsequently granted defendant's motions to suppress evidence and to set aside verdict based on insufficient evidence, government could appeal decisions on both motions because reversal would merely require reinstatement of finding of guilt); *United States v. Morrison*, 429 U.S. 1, 4 (1976) (per curiam) (to same effect).

In contrast, the government may not appeal from an acquittal that is not preceded by a finding of guilt even though the acquittal may be attributable to an erroneous suppression of evidence. *See* *Sanabria v. United States*, 437 U.S. 54, 68-69 (1978); *United States v. Ember*, 726 F.2d 522, 524-25 (9th Cir. 1984).

e. Cross-Appeals by Defendants

A defendant may not cross-appeal when the government appeals a suppression order under § 3731 and, thus, while the court can consider "any argument advanced by a defendant that provides an alternative ground upon which to affirm the district court, it may not consider "any defense argument seeking suppression of additional evidence which the district court did not suppress." *United States v. Becker*, 929 F.2d 442, 447 (9th Cir. 1991); *accord* *United States v. Fort*, 472 F.3d 1106, 1121 (9th Cir. 2007); *United States v. Eccles*, 850 F.2d 1357, 1361-62 (9th Cir. 1988).

4. ORDER IMPOSING SENTENCE

a. Sentence Imposed under Guidelines

The government's right to appeal from a sentence imposed under the Sentencing Guidelines is governed by 18 U.S.C. § 3742(b), rather than § 3731. For coverage of jurisdictional issues pertaining to such appeals, *see Office of Staff Attorneys' Sentencing Guidelines Outline*.

b. Other Sentences and Related Orders

The government may appeal other sentences and related orders under § 3731. *See* *United States v. Blue Mountain Bottling Co.*, 929 F.2d 526, 527-28 (9th Cir. 1991) (court had jurisdiction under § 3731 over government appeal from sentences requiring defendants to make payments to a fund created by district court for benefit of local substance abuse organizations); *United States v. Sweeney*, 914 F.2d 1260, 1262 (9th Cir. 1990) (district court had appellate jurisdiction under § 3731 over government's appeal of magistrate judge's order to U.S. Attorney not to report defendants' convictions to state authorities); *United States v. Edmonson*, 792 F.2d 1492, 1496-97 (9th Cir. 1986) (government appeal authorized under § 3731 from sentences imposed under statute different than statute under which defendants were indicted).

The Double Jeopardy Clause generally does not limit government appeals from sentences. *See* *United States v. DiFrancesco*, 449 U.S. 117, 132 (1980) (in a case concerning now-repealed statute providing for government appeals from certain sentences, neither an appeal itself nor the relief requested was prohibited by the Double Jeopardy Clause); *United States v. Rosales*, 516 F.3d 749, 757-58 (9th Cir. 2008) (double jeopardy does not bar government from appealing sentencing ruling that does not result in acquittal); *United States v. Edmonson*, 792 F.2d 1492, 1496-97 (9th Cir. 1986) (double jeopardy did not bar government appeal from sentence because district court "had no power to convict and sentence [defendants] for a different crime" than the one charged in the indictment).

5. ORDER RELEASING PERSON CHARGED OR CONVICTED

"An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release." 18 U.S.C. § 3731.

The government may appeal from release or detention orders pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3731. *See* *United States v. Evans*, 62 F.3d 1233, 1234-35 (9th Cir. 1995); 18 U.S.C. § 3145(c) ("An appeal from a release or

detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of § 1291 of title 28 and § 3731 of this title."). For example, an order granting bail pending appeal of a decision granting a state prisoner's habeas petition is appealable under the collateral order doctrine. *See* *Marino v. Vasquez*, 812 F.2d 499, 507 n.10 (9th Cir. 1987). An order granting bail pending a hearing under 18 U.S.C. § 3184 to determine extraditability is "final" within the meaning of 28 U.S.C. § 1291. *See* *United States v. Kirby (In re Requested Extradition of Kirby)*, 106 F.3d 855, 861 (9th Cir. 1996).

6. OTHER ORDERS

"[G]overnment appeals are not restricted to § 3731's specific categories." *United States v. Sweeney*, 914 F.2d 1260, 1262 (9th Cir. 1990); *see also* *United States v. Stanton*, 501 F.3d 1093, 1097-98 (9th Cir. 2007); *United States v. Ching Tang Lo*, 447 F.3d 1212, 1220 (9th Cir. 2006).

Where jurisdiction over a government appeal is questionable under § 3731, the court of appeals has on occasion proceeded under its mandamus powers. *See, e.g.,* *United States v. Barker*, 1 F.3d 957, 958-59 (9th Cir. 1993) (exercising mandamus powers where appellate jurisdiction over an order splitting elements of a crime into two parts for purposes of trial was unclear).

a. Additional Orders Appealable by the Government

The government has also been permitted to appeal in the following instances:

- Order denying government's "Motion to Determine the Admissibility of Evidence" appealable under 18 U.S.C. § 3731 because in effect it was a "decision . . . suppressing or excluding evidence." *United States v. Humphries*, 636 F.2d 1172, 1175 (9th Cir. 1980).

- Ruling that statute's capital sentencing provisions were unconstitutional was appealable because § 3731 was intended to remove all statutory barriers to appeal or, alternatively, appeal could be treated as writ petition. *See* *United States v. Cheely*, 36 F.3d 1439, 1441 (9th Cir. 1994).

- Order prohibiting U.S. Attorney from reporting defendants' convictions to state authorities appealable under § 3731. *See* *United States v. Sweeney*, 914 F.2d 1260, 1262 (9th Cir. 1990) (concluding district court had appellate jurisdiction over magistrate judge order).

- Order denying extradition appealable because treaty provision creating defense at issue provided for direct appeal. *See* *United States v. Smyth (In re Requested Extradition of Smyth)*, 61 F.3d 711, 713 (9th Cir.), *amended*, 73 F.3d 887 (9th Cir. 1995).

- Order quashing subpoena appealable under 18 U.S.C. § 3731. *See* *United States v. Hirsch (In re Grand Jury Subpoena)*, 803 F.2d 493, 495 (9th Cir. 1986), *corrected*, 817 F.2d 64 (9th Cir. 1987).

- Refusal by district court to set case for retrial following reversal of convictions appealable under § 3731 because tantamount to dismissal of an indictment. *See* *United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995).

- Pre-trial order staying criminal proceedings was appealable under 28 U.S.C. § 1291 because it effectively put the government out of court. *See* *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1360-62 (9th Cir. 1987).

- Order denying government motion to transfer juvenile for adult criminal prosecution appealable under collateral order doctrine. *See* *United States v. Doe*, 94 F.3d 532, 535 (9th Cir. 1996).

b. Additional Orders Not Appealable by the Government

The government has not been permitted to appeal in the following instances:

- Order in criminal case directing government to produce documents for in camera inspection in response to defendant's request under Freedom of Information Act not appealable on interlocutory basis.

See *United States v. United States Dist. Court*, 717 F.2d 478, 481 (9th Cir. 1983) (granting government's mandamus petition). *But cf.* *United States v. Dominguez-Villa*, 954 F.2d 562, 564-65 (9th Cir. 1992) (order directing government to supply certain information to defendants appealable where order stated noncompliance would preclude witnesses from testifying, government declined to comply, and district court refused to issue suppression order requested by government).

- Order granting mistrial not appealable because it explicitly contemplates reprosecution. *See* *United States v. Jorn*, 400 U.S. 470, 476 (1971) (plurality opinion).

C. APPEALS CONCERNING GRAND JURY PROCEEDINGS

Cross-reference: VIII.A.12 (regarding defendants' appeals from orders denying dismissal for grand jury irregularities).

1. ORDER GRANTING MOTION TO QUASH GRAND JURY SUBPOENA

Under 18 U.S.C. § 3731, the government may appeal an order quashing a subpoena. *See* *United States v. Hirsch (In re grand Jury Subpoenas)*, 803 F.2d 493, 465 (9th Cir. 1986), *corrected by* 817 F.2d 64 (9th Cir. 1987).

2. ORDER DENYING MOTION TO QUASH GRAND JURY SUBPOENA

Generally, an order denying a motion to quash a subpoena is not appealable; review must await an adjudication of contempt. *See* *United States v. Ryan*, 402 U.S. 530, 532-33 (1971); *Silva v. United States (In re Grand Jury Subpoena Issued to Bailin)*, 51 F.3d 203, 205 (9th Cir.1995).

Under *Perlman v. United States*, 247 U.S. 7 (1918), there is a narrow exception permitting appeals of orders denying motions to quash "where the subpoena is directed at a third party who cannot be expected to risk a contempt citation in order to preserve" the right to appeal of the party asserting the privilege.

Silva v. United States (In re Grand Jury Subpoena Issued to Bailin), 51 F.3d 203, 205 (9th Cir. 1995) (internal quotation marks and citation omitted).

Cross-reference: II.C.12.b.ii (regarding the *Perlman* exception).

3. ORDER CONFINING RECALCITRANT WITNESS (28 U.S.C. § 1826)

Under 28 U.S.C. § 1826(a), a district court may confine a witness who "in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information." 28 U.S.C. § 1826(a).

The court of appeals has jurisdiction over a confinement order under 28 U.S.C. § 1291 and 18 U.S.C. § 1826. *See Trimiew v. United States (In re Grand Jury Proceedings)*, 9 F.3d 1389, 1390 (9th Cir. 1993).

4. ORDER DENYING *KASTIGAR* HEARING

At a *Kastigar* hearing, the government is required to prove that any evidence it intends to use to prosecute a grand jury witness has a legitimate source independent of the witness's compelled grand jury testimony. *See United States v. Rockwell Int'l Corp. (In re Grand Jury Subpoena)*, 119 F.3d 750, 751 & n.1 (9th Cir. 1997) (citing *Kastigar v. United States*, 406 U.S. 441 (1972)).

"The district court's decision not to exercise its supervisory powers over an ongoing grand jury investigation by holding a pre-indictment *Kastigar* hearing" is not immediately appealable. *Id.* at 755 (distinguishing *United States v. Anderson*, 79 F.3d 1522 (9th Cir. 1996), where appellant requested post-indictment *Kastigar* hearing after grand jury proceedings had concluded).

5. ORDER GRANTING OR DENYING DISCLOSURE OF GRAND JURY MATERIALS

a. Disclosure Motions Made During Criminal Proceedings

As a general rule, orders denying defendants' motion for disclosure of grand jury materials, made in the course of criminal proceedings, are not appealable

collateral orders. *See* *United States v. Schiff*, 874 F.2d 705, 706 (9th Cir. 1989); *United States v. Almany*, 872 F.2d 924, 925-26 (9th Cir. 1989); *but see* *United States v. Zone*, 403 F.3d 1101, 1107 (9th Cir. 2005) (explaining that, where discovery request seeks to establish right not to be tried, court of appeals may have jurisdiction).

However, defendants may appeal from orders granting disclosure motions made by a third party during a criminal case. *See* *United States v. Fischbach & Moore, Inc.*, 776 F.2d 839, 841-42 (9th Cir. 1985).

b. Independent Actions Seeking Disclosure

An order conclusively ruling on a request for disclosure of grand jury materials made in an independent judicial proceeding is final and appealable under 28 U.S.C. § 1291. *See* *Wolf v. Oregon State Bar (In re Barker)*, 741 F.2d 250, 252 (9th Cir. 1984); *Sells, Inc. v. United States (In re Grand Jury Investigation No. 78-184)*, 642 F.2d 1184, 1187 (9th Cir. 1981) (order permitting disclosure of grand jury materials appealable where criminal proceedings had terminated and government's civil proceedings against defendants did not begin until nine months after disclosure order), *aff'd by* 463 U.S. 418 (1983).

D. APPEALS FROM DECISIONS OF MAGISTRATE JUDGES

1. INITIAL APPEAL TO DISTRICT COURT

a. Statutory Authority

Appeals in criminal matters over which magistrate judges have jurisdiction to enter judgment are taken to the district court, as provided by 18 U.S.C. § 3402 (appeals from judgment of conviction), § 3742(h) (appeals from sentence), and Fed. R. Crim. P. 58(g)(2) (covering both interlocutory appeals and appeals from convictions and sentences).

Under these provisions, appeals generally may be taken to the district court if the same decision or order made by a district court could be appealed to the court of appeals. *See* *United States v. Sweeney*, 914 F.2d 1260, 1261-62 (9th Cir. 1990).

b. Time in Which to Appeal

Both defendants and the government have ten days from entry of an appealable decision by a magistrate judge in which to file a notice of appeal to the district court. *See* Fed. R. Crim. P. 58(g)(2)(A) (interlocutory appeals), (B) (appeals from conviction or sentence).

c. Appeals Mistakenly Taken to Ninth Circuit

Where a criminal appeal from a magistrate judge's decision had previously been filed in district court, defendant's appeals to Ninth Circuit dismissed. *See* *United States v. Soolook*, 987 F.2d 574, 575 (9th Cir. 1993).

2. APPEALS FROM DISTRICT COURT TO NINTH CIRCUIT

a. Statutory Authority

i. Government Appeals

Government appeals from decisions of district courts reviewing magistrate judges' decisions in criminal cases are governed by 28 U.S.C. § 1291 and 18 U.S.C. § 3731. *See* *United States v. Evans*, 62 F.3d 1233, 1235 (9th Cir. 1995) (case in which government sought review of district court's reversal of magistrate judge's pretrial detention order); *United States v. Lee*, 786 F.2d 951, 956 (9th Cir. 1986) (holding that government could appeal from district court order because it "effectively foreclosed the government from prosecuting the civilian offenders in federal court" so as to be analogous to the dismissal of an information appealable under § 3731; in addition, an appeal lay under § 1291 because the district court ruling "effectively terminated the district court litigation, sending the parties out of federal court").

ii. Appeals by Defendants

Appeals by defendants from decisions of district courts reviewing magistrate judges' decisions in criminal cases are apparently governed by 28 U.S.C. § 1291. *See United States v. Evans*, 62 F.3d 1233, 1235 (9th Cir. 1995) (dictum that defendants could appeal district court's decision reviewing magistrate judge's pretrial detention pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3731, but latter only provides for government appeals).

iii. Appealability of Non-Final District Court Decisions

Not all appellate decisions of district courts in criminal cases are appealable to the Ninth Circuit. *See United States v. Atwell*, 681 F.2d 593, 594 (9th Cir. 1982) (decision reversing order of magistrate judge that dismissed indictment for lack of subject matter jurisdiction not appealable, as no final order existed).

Although an appellate decision of a district court may envision further proceedings before the magistrate judge, the district court's decision could still be appealable under the collateral order doctrine, at least where the defendant raises a double jeopardy claim. *See, e.g., United States v. Szado*, 912 F.2d 390, 392-93 (9th Cir. 1990) (court of appeals had jurisdiction to review order of district court denying defendant's motion for reconsideration requesting that, in reversing conviction entered by magistrate based on denial of right to jury trial, district court reviews evidence for sufficiency to determine whether retrial would be double jeopardy); *see also United States v. Foumai*, 910 F.2d 617, 621 (9th Cir. 1990); *United States v. Govro*, 833 F.2d 135, 136 n.2 (9th Cir. 1987); *United States v. Baptiste*, 832 F.2d 1173, 1174 n.1 (9th Cir. 1987).

E. APPEALS CONCERNING DEFENSE FEES AND COMPENSATION

1. DISTRICT COURT JURISDICTION OVER FEE APPLICATION

A defense attorney appointed under the Criminal Justice Act, 18 U.S.C. § 3006A, can appeal under the collateral order doctrine a decision by the district

court declining to consider counsel's fee application on the ground that timely submission of the application is a jurisdictional requirement. *See* *United States v. Poland (In re Derickson)*, 640 F.2d 946, 947-48 (9th Cir. 1981) (per curiam); *see also* *United States v. Ray*, 375 F.3d 980, 986 (9th Cir. 2004).

2. AMOUNT OF COMPENSATION

Orders establishing the amount of compensation for counsel appointed under the Criminal Justice Act are not "final decisions" of a judicial character as required to be appealable under 28 U.S.C. § 1291. *United States v. Walton (In re Baker)*, 693 F.2d 925, 926-27 (9th Cir. 1982) (per curiam) (dismissing defense counsel's appeal from an order certifying less than amount of compensation requested).

However, on appeal from a final conviction, the court of appeals has jurisdiction to review the effect on a conviction of an allegedly erroneous denial of the defendant's request for additional investigative funds. *See* *United States v. Fields*, 722 F.2d 549, 551 (9th Cir. 1983).

A criminal defendant lacks standing to appeal the amount of fees paid a defense witness under 28 U.S.C. § 1825 where any effect on defendant's trial rights is merely speculative. *See* *United States v. Viltrakis*, 108 F.3d 1159, 1161 (9th Cir. 1997).

F. TIMELINESS OF CRIMINAL APPEALS

1. NON-JURISDICTIONAL

The time periods for appeal under Fed. R. App. P. 4(b) are non-jurisdictional and are subject to forfeiture. *United States v. Sadler*, 480 F.3d 932, 934 (9th Cir. 2007). Prior to *Sadler*, the time periods were assumed jurisdictional. *See, e.g.*, *United States v. Clark*, 984 F.2d 319, 320 (9th Cir. 1993) (per curiam) (defendant's failure to file notice of appeal within ten days from order revoking supervised release and imposing additional sentence precluded appellate jurisdiction). *Sadler* noted that two recent Supreme Court decisions effectively abrogated this rule by distinguishing between jurisdiction-conferring statutes and court-created rules governing procedure. *Sadler*, 480 F.3d at 933-34, 940 (citing *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam) and *Kontick v. Ryan*, 540 U.S. 443 (2004)).

2. TIME TO FILE

a. Appeal by Defendant

"In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of (i) the entry of either the judgment or the order being appealed; or (ii) the filing of the government's notice of appeal." Fed. R. App. P. 4(b)(1)(A). "Where a district court enters an amended judgment that revises legal rights or obligations, the period for filing an appeal begins anew." *United States v. Doe*, 374 F.3d 851, 853-54 (9th Cir. 2004).

The discrepancy under Fed. R. App. P. 4(b)(1)(A) between the time period for a defendant to appeal and the time period for the government to appeal does not deny defendants equal protection. *See United States v. Avendano-Camacho*, 786 F.2d 1392, 1394 (9th Cir. 1986).

b. Appeal by Government

"When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of: (i) judgment or order being appealed; or (ii) the filing of a notice of appeal by any defendant." Fed. R. App. P. 4(b)(1)(B). A government appeal in a criminal case "shall be taken within thirty days after the decision, judgment or order has been rendered." 18 U.S.C. § 3731.

3. APPLICABILITY OF FED. R. APP. P. 4(b) TIME LIMITS

Appeals from orders constituting a "step in the criminal proceeding" are governed by Fed. R. App. P. 4(b) unless the proceeding arises from a statute providing its own procedures and time limits. *See United States v. Ono*, 72 F.3d 101, 102-03 (9th Cir. 1995) (order).

> *Cross-reference*: III.A.5 (regarding which types of orders are deemed civil and which are deemed criminal for timeliness of appeal purposes).

a. Cases Governed by Rule 4(b)

Fed. R. App. P. 4(b) time limits apply in the following instances:

- District court order affirming conviction entered by magistrate judge. *See* *United States v. Mortensen*, 860 F.2d 948, 950 (9th Cir. 1988).

- Order granting or denying motion to alter sentence. *See* *United States v. Ono*, 72 F.3d 101, 102 (9th Cir. 1995) (order denying defendant's motion to modify sentence under 18 U.S.C. § 3582(c)); *United States v. Clark*, 984 F.2d 319, 320 (9th Cir. 1993) (per curiam) (order revoking supervised release and imposing additional sentence); *United States v. Davison*, 856 F.2d 1289, 1291 (9th Cir. 1988) (order denying government motion to convert defendant's sentence under Youth Correction Act to adult sentence).

- Order disposing of petition for writ of error coram nobis. *See* *Yasui v. United States*, 772 F.2d 1496, 1499 (9th Cir. 1985), *superseded by rule as stated in* *United States v. Kwan*, 407 F.3d 1005, 1011 n.2 (9th Cir. 2005).

b. Cases Not Governed by Rule 4(b)

Fed. R. App. P. 4(b) time limits do not apply in the following instances:

- Order enforcing Judicial Recommendation Against Deportation against the INS, even though order issued in the course of a criminal case. *See* *United States v. Yacoubian*, 24 F.3d 1, 4-5 (9th Cir. 1994) (Fed. R. App. P. 4(a) time limits apply).

- Order enjoining government from filing forfeiture action. *See* *United States v. Kismetoglu*, 476 F.2d 269, 270 n.1 (9th Cir. 1973) (per curiam) (Fed. R. App. P. 4(a) time limits apply).

- Order denying motion to quash grand jury subpoena. *See* *Manges v. United States (In re Grand Jury Proceedings)*, 745 F.2d 1250, 1251 (9th Cir. 1984) (Fed. R. App. P. 4(a) time limits apply).

- Bail decisions in extradition proceeding under 18 U.S.C. § 3184. *See* *United States v. Kirby (In re Requested Extradition of Kirby)*, 106 F.3d 855, 857 n.1 (9th Cir. 1996) (order governed by Fed. R. App. P. 47(b) because neither civil nor criminal in nature).

4. COMPUTATION OF APPEAL DEADLINE

a. Days Counted

Fed. R. App. P. 26(a) sets forth the manner for calculating the deadline for filing an appeal. *See* III.A.4 (regarding computation of appeal deadline under Fed. R. App. P. 26).

b. Date Notice of Appeal "Filed"

A notice of appeal is deemed filed for Fed. R. App. P. 4(b) purposes when it is received by the district court clerk's office. *See* *King v. United States*, 410 F.2d 1127, 1127 (9th Cir. 1969) (per curiam) (notice of appeal timely where received by clerk, but not filed, within time period for appeal); *see also* *United States v. Clay*, 925 F.2d 299, 301 (9th Cir. 1991) (clerk's receipt of facsimile transmission of notice of appeal constituted "functional equivalent" of filing), *overruled on other grounds by* *Rodriguera v. United States*, 954 F.2d 1465 (9th Cir. 1991); *cf.* *Smith v. United States*, 425 F.2d 173, 174-75 (9th Cir. 1970) (oral declaration of intent to appeal does not comply with notice of appeal filing requirements).

A notice of appeal mistakenly filed with the court of appeals is to be transmitted to the district court for filing on the date it was received by the court of appeals. *See* *Brannan v. United States*, 993 F.2d 709, 710 (9th Cir. 1993) (noting that "the equities underlying the transfer provision of Rule 4(a) also are present in the context of criminal appeals, especially when the notice of appeal is submitted by a pro se litigant").

5. "ENTRY" OF JUDGMENT

A judgment or order is entered "when it is entered on the criminal docket." Fed. R. App. P. 4(b)(6); *see also* *United States v. Ronne*, 414 F.2d 1340, 1342 n.1

(9th Cir. 1969) (time period for appeal under Fed. R. App. P. 4(b) measured from date judgment entered, not date judgment filed); *United States v. Thoreen*, 653 F.2d 1332, 1337-38 (9th Cir. 1981) (appeal from order of criminal contempt timely, though noticed 11 days after order filed, because order entered on civil but not criminal docket).

The district court must intend its order be final for the time period for appeal to begin to run. *See United States v. Samango*, 607 F.2d 877, 880 (9th Cir. 1979) (time to appeal did not begin to run upon entry of oral ruling on docket because district court repeatedly expressed intent to issue written order incorporating and elucidating ruling); *see also United States v. Burt*, 619 F.2d 831, 835 (9th Cir. 1980) (notice of appeal from clerk's minutes indicating denial of defendants' motions to dismiss not effective until district court rendered final decisions on motions).

6. DOCUMENTS CONSTRUED AS NOTICE OF APPEAL

A document evincing an intent to appeal may be construed as a notice of appeal. *See Brannan v. United States*, 993 F.2d 709, 710 (9th Cir. 1993) (pro se letter to court of appeals referring to district court order revoking probation and indicating defendant sought to "get the sentenced reduced" construed as notice of appeal); *see also United States v. Johnson*, 988 F.2d 941, 943 (9th Cir. 1993) (defendant's filing of new district court action to challenge denial of motion to reduce sentence construed as notice of appeal in 28 U.S.C. § 2255 action).

> *Cross-reference*: IV.B (regarding notice of appeal requirements under Fed. R. App. P. 3).

7. PREMATURE NOTICE OF APPEAL

"A notice of appeal filed after the court announces a decision, sentence, or order – but before entry of the judgment or order – is treated as filed on the date of and after the entry." Fed. R. App. P. 4(b)(2); *see also Lemke v. United States*, 346 U.S. 325, 326 (1953) (notice of appeal filed after sentencing but before entry of judgment); *United States v. Wade*, 841 F.2d 331, 332 (9th Cir. 1988) (per curiam) (notice of appeal filed after verdict but before sentencing); *United States v.*

Thoreen, 653 F.2d 1332, 1338 (9th Cir. 1981) (notice of appeal filed after court's announcement of order but before entry).

8. EXTENSION OF TIME TO APPEAL (EXCUSABLE NEGLECT)

"Upon a finding of excusable neglect or good cause, the district court may – before or after the time has expired, with or without motion and notice – extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed in this Rule 4(b)." Fed. R. App. P. 4(b)(4); *see, e.g.*, *United States v. Mortensen*, 860 F.2d 948, 950 (9th Cir. 1988) (court of appeals had jurisdiction over late-filed appeal where, on remand, district court found excusable neglect for delay).

a. Timing of Appeal

i. Appeal Outside 30-Day Extension Period

A district court lacks power to extend the deadline for filing an appeal more than 30 days beyond the prescribed time period. *See United States v. Green*, 89 F.3d 657, 659-60 (9th Cir. 1996). A notice of appeal filed more than 30 days after the prescribed time period for appeal expired must be dismissed only if a party properly asserts that it be dismissed for untimeliness. *See United States v. Sadler*, 480 F.3d 932, 942 (9th Cir. 2007). The non-jurisdictional nature of Rule 4(b) does not give courts discretion in the matter – an untimely appeal must be dismissed if the untimeliness argument is properly raised. *See id.* ; *see also United States v. Buzard*, 884 F.2d 475, 475-76 (9th Cir. 1989) (appeal dismissed where notice of appeal filed more than 30 days after expiration of time to appeal because even if "excusable neglect" existed district court could not grant extension; district court attempt to circumvent rule by reentering subject order on later date rejected). *Sadler* left unanswered the question whether the cap on extension length permitted by the district court is subject to forfeiture when an objection is not properly raised. *Sadler*, 480 F.3d at 937 n.5.

ii. Appeal Within 30-Day Extension Period

Where a notice of appeal is filed less than 30 days after expiration of the time period for appeal under Fed. R. App. P. 4(b), the case is subject to remand for

the limited purpose of determining whether excusable neglect exists for the late filing. *See* *United States v. Ono*, 72 F.3d 101, 103 (9th Cir. 1995) (appeal from denial of defendant's motion under 18 U.S.C. § 3582(c) to modify term of imprisonment); *Brannan v. United States*, 993 F.2d 709, 710 (9th Cir. 1993).

b. Express Finding by District Court

When a district court extends the time to file a notice of appeal without referring to either Fed. R. App. P. 4(b) or the excusable neglect requirement, and the record does not disclose the reason for an extension, the case may be remanded for an excusable neglect determination. *See* *United States v. Sotelo*, 907 F.2d 102, 102-103 (9th Cir. 1990); *cf.* *United States v. Stolarz*, 547 F.2d 108, 111 (9th Cir. 1976) (acceptance by district court of a notice of appeal filed outside the usual time in which to appeal does not itself constitute a grant of additional time in which to appeal).

c. "Excusable Neglect" Standard under *Pioneer*

See III.E for coverage of the excusable neglect standard set forth in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388-97 (1993).

The *Pioneer* standard has been applied to criminal appeals under Fed. R. App. P. 4(b). *See* *Stutson v. United States*, 516 U.S. 193, 194-95 (1996); *cf.* *United States v. Prairie Pharmacy, Inc.*, 921 F.2d 211, 213 (9th Cir. 1990) (court of appeals accords greater deference to district court finding of excusable neglect in criminal case than in civil case, and, conversely, reviews more searchingly a finding of no excusable neglect). However, the Ninth Circuit has not yet determined the impact of *Pioneer* on prior decisions defining excusable neglect in the criminal context.

d. Determining Excusable Neglect

i. Lack of Notice from Clerk

The district court clerk's failure to mail the parties a copy of an order, as required by Fed. R. Crim. P. 49(c), may be considered in determining excusable

neglect. *See* *United States v. Stolarz*, 547 F.2d 108, 111 n.2 (9th Cir. 1976). But, once the 30-day period for granting an extension under Fed. R. App. P. 4(b) has expired, the clerk's failure to mail a copy of an order to the parties provides no basis for granting an extension of the time period for appeal. *See* *United States v. Green*, 89 F.3d 657, 659-61 (9th Cir. 1996) (discussing interrelationship of Fed. R. Crim. P. 49(c) and Fed. R. App. P. 4(b)); *see also* *United States v. Buzard*, 884 F.2d 475, 475-76 (9th Cir. 1989) (same).

ii. Mistake of Counsel

Mistake of counsel does not generally constitute excusable neglect. *See* *United States v. Prairie Pharmacy, Inc.*, 921 F.2d 211, 213 (9th Cir. 1990) (counsel's mistaken notion of time in which to file notice of appeal did not constitute excusable neglect). *But see* *United States v. Houser*, 804 F.2d 565, 569 (9th Cir. 1986) (excusable neglect finding upheld where counsel failed to file timely notice of appeal, and incarcerated pro se litigant immediately filed motion for leave to file late notice pro se upon learning of his counsel's failure).

iii. Other Grounds

The district court did not abuse its discretion in finding excusable neglect where defendant and attorney attempted to contact one another regarding whether to file notice of appeal, but communication was difficult because defendant was moved among three prisons in different states during the period immediately following entry of judgment. *See* *United States v. Smith*, 60 F.3d 595, 596-97 (9th Cir. 1995).

9. EFFECT OF POST-JUDGMENT MOTIONS

a. Motion for Reconsideration (by Defendant or Government)

A motion for reconsideration in a criminal case, as in a civil case, "renders an otherwise final decision of a district court not final until it decides the petition for rehearing." *United States v. Ibarra*, 502 U.S. 1, 6 (1991) (citing *United States v. Dieter*, 429 U.S. 6 (1976) (per curiam) and *United States v. Healy*, 376 U.S. 75 (1964)).

Where a motion for reconsideration is filed within the prescribed time period for appeal from the original order, the time period for appeal begins to run upon disposition of the motion for reconsideration. *See* *United States v. Davison*, 856 F.2d 1289, 1291 (9th Cir. 1988) (appeal by government); *United States v. Lefler*, 880 F.2d 233, 235 (9th Cir. 1989) (appeal by defendant); *see also* *United States v. Ibarra*, 502 U.S. 1 , 7 n.3 (1991) ("We . . . have no occasion to consider whether it is appropriate to refuse to extend the time to appeal in cases in which successive motions for reconsideration are submitted.").

b. Other Post-Judgment Motions (by Defendant)

If a defendant timely files a post-judgment tolling motion, "the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later." Fed. R. App. P. 4(b)(3).

If timely filed, the following motions will toll the time period for appeal: (1) motion for judgment of acquittal; (2) motion for arrest of judgment; (3) motion for new trial on grounds other than new evidence; or (4) motion for new trial based on newly discovered evidence if motion is made no later than 10 days after the entry of judgment. *See* Fed. R. App. P. 4(b)(3); *see, e.g.,* *United States v. Stolarz*, 547 F.2d 108, 110 (9th Cir. 1976) (untimely-served pre-sentence motion for new trial did not toll time period for appeal).

A timely Fed. R. Crim. P. 35(a) motion for correction of sentence extends the time to file a notice of appeal from the underlying sentence. *United States v. Barragan-Mendoza*, 174 F.3d 1024, 1026 (9th Cir. 1999).

c. Notice of Appeal Filed While Post-Judgment Motion Pending

"A notice of appeal filed after the court announces a decision, sentence, or order – but before it disposes of [a specified tolling motion] – becomes effective upon the later of the following: (i) the entry of the order disposing of the last such remaining motion; or (ii) the entry of the judgment of conviction." Fed. R. App. P. 4(b)(3)(B). The notice of appeal, if otherwise valid, is effective without

amendment to appeal from the order disposing of the tolling motion. *See id*; *United States v. Cortes*, 895 F.2d 1245, 1246-47 (9th Cir. 1990) (notice of appeal effective even though filed during pendency of motion for new trial).

G. SCOPE OF DIRECT CRIMINAL APPEALS

1. ISSUES NOT RAISED BELOW

a. Generally

Issued not raised before the district court generally cannot be raised for the first time on appeal. *See United States v. Robertson*, 52 F.3d 789, 791 (9th Cir. 1994); *see also United States v. Flores-Montano*, 424 F.3d 1044, 1047 (9th Cir. 2005). *But see, e.g., United States v. Odedo*, 154 F.3d 937, 939-40 (9th Cir. 1998) (stating that all violations of Rule 11 are reviewed for harmless error "regardless of whether they were ever raised before the district court"), *overruled by United States v. Vonn*, 535 U.S. 55, 58-59 (2002) (reviewing Rule 11 violations for plain error), *on remand to United States v. Vonn*, 292 F.3d 1093, 1093-94 (9th Cir. 2002) (recognizing that *Vonn* overruled *Odedo*).

The government waived its argument that the district court was bound by the sentencing range provided for in the plea agreement by failing to raise this issue before the district court. *United States v. Perez-Corona*, 295 F.3d 996, 1000 (9th Cir. 2002).

b. Plain Error

"A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). The court of appeals may entertain an objection that was not raised below "when plain error has occurred or an injustice might otherwise result." *See United States v. Pimental-Flores*, 339 F.3d 959, 967 (9th Cir. 2003).

To permit correction by the court of appeals, there must be: "(1) error, (2) that is plain and (3) affects 'substantial rights.'" *United States v. Barsumyan*, 517 F.3d 1154, 1160 (9th Cir. 2008) (quoting *United States v. Olano*, 507 U.S. 725, 732-34 (1993)); *see also United States v. Pimental-Flores*, 339 F.3d 959, 967 (9th

Cir. 2003) (explaining the court may reverse under a plain error analysis when "(1) there was actual error; (2) the error was plain (i.e. "clear" or "obvious"); and (3) the error affected the defendant's "substantial rights."). If all three conditions are met, the court of appeals has discretion to notice an error not raised before the district court, but only if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Barsumyan*, 517 F.3d at 1160 (internal quotation marks and citation omitted); *see also Johnson v. United States*, 520 U.S. 461, 466 (1997) (cautioning against expanding, or creating exceptions to, the plain error standard).

For a discussion of the "plain error" standard as applied by the Ninth Circuit, see *Federal Appellate Practice Guide, Ninth Circuit* §§ 10:12, :15 (2005).

c. Other Grounds

Issues may be reviewed for the first time on appeal where: "(1) there are 'exceptional circumstances' why the issue was not raised in the trial court, (2) the new issues arise while the appeal is pending because of a change in the law, or (3) the issue presented is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court." *United States v. Robertson*, 52 F.3d 789, 791 (9th Cir. 1994); *see, e.g.*, *United States v. Fonseca-Caro*, 114 F.3d 906, 907 n.2 (9th Cir. 1997) (per curiam) (addressing purely legal question raised for first time on appeal where opposing party will not suffer prejudice from issue not being raised below because issue had been fully briefed); *United States v. Flores-Montano*, 424 F.3d 1044, 1047 (9th Cir. 2005) (addressing purely legal question where government would not suffer prejudice as a result of the failure to raise the issue in the trial court).

2. SCOPE OF APPEAL BY DEFENDANT

a. Review of Interlocutory Order on Appeal from Final Judgment

An order from which interlocutory appeal is permissive, not mandatory, may be reviewed on appeal from a conviction. *See United States v. Gamble*, 607 F.2d 820, 822-23 (9th Cir. 1979) (permitting review of order denying motion to dismiss indictment on double jeopardy grounds); *cf. United States v. Eccles*, 850 F.2d

1357, 1362-63 (9th Cir. 1988) (barring defendant's interlocutory appeal as untimely did not violate due process because claims concerning disqualification of government counsel and production of grand jury transcript could be raised following trial, as could non-harmless prosecutorial misconduct before grand jury).

b. Ability of Other Defendants to Join in Appeal

The court of appeals has declined to exercise jurisdiction over request by corporate defendant to join in co-defendant's appeal where, although corporate defendant may be an "aggrieved party," it did not participate in pretrial proceedings regarding the government's motion for order restraining disposition of property, and did not file a notice of appeal. *See* *United States v. Spilotro*, 680 F.2d 612, 616 (9th Cir. 1982).

c. Appeals from Separate Cases Arising from Same Conduct

Where the same conduct of a defendant resulted in revocation of supervised release and imposition of additional sentence in two separate cases, a timely appeal in one case did not bring the other case up on appeal. *See* *United States v. Clark*, 984 F.2d 319, 320 (9th Cir. 1993) (per curiam).

d. Appeal Following Unconditional Guilty Plea

i. General Rule

"An unconditional guilty plea constitutes a waiver of the right to appeal all non-jurisdictional antecedent rulings and cures all antecedent constitutional defects." *United States v. Floyd*, 108 F.3d 202, 204 (9th Cir. 1997); *see also* *United States v. Lopez-Armenta*, 400 F.3d 1173, 1175 (9th Cir. 2005); *but see* *United States v. Jacobo Castillo*, 496 F.3d 947, 949-50 (9th Cir. 2007) (en banc) (holding that a defendant's waiver is nonjurisdictional and subject to forfeiture and that a valid guilty plea does not deprive the court of jurisdiction).

Jurisdictional claims are not waived by a guilty plea. *See* *United States v. Caperell*, 938 F.2d 975, 977 (9th Cir. 1991). However, such claims can only be based on the indictment itself and the face of the record. *See* *United States v.*

Broce, 488 U.S. 563, 575-76 (1989) (distinguishing double jeopardy claims that are waived from those that are based on need for "further proceedings at which to expand the record with new evidence"). *Compare* *United States v. Wong*, 62 F.3d 1212, 1215 n.1 (9th Cir. 1995) (double jeopardy claim not waived because claim could be resolved by looking at indictment and record) *and* *Caperell*, 938 F.2d at 977-78 (claim that indictment failed to state an offense not waived because it could be resolved by examining indictment and relevant statute) *with* *United States v. Cortez*, 973 F.2d 764, 766-67 (9th Cir. 1992) (assuming selective prosecution is a "jurisdictional" claim, it was waived because it could not be proven from either the indictment or the record at the plea stage) *and* *United States v. Montilla*, 870 F.2d 549, 552-53 (9th Cir. 1989) (guilty plea waived claim akin to vindictive prosecution because allegations could not be proven without an evidentiary hearing and, on its face, the indictment alleged offenses well within government's power to prosecute), *amended*, 907 F.2d 115 (9th Cir. 1990).

ii. Specific Claims Waived by Guilty Plea

A valid guilty plea waives the right to appeal from earlier rulings on the following issues:

- Claim of denial of assistance of counsel at in camera hearing. *See* *United States v. Bohn*, 956 F.2d 208, 209 (9th Cir. 1992) (per curiam).

- Challenge to facts established by guilty plea. *See* *United States v. Mathews*, 833 F.2d 161, 163-64 (9th Cir. 1987) (even where facts formed basis for federal jurisdiction).

- Claimed violation of right to speedy trial. *See* *United States v. Bohn*, 956 F.2d 208, 209 (9th Cir. 1992) (per curiam) (Speedy Trial Act violation); *United States v. O'Donnell*, 539 F.2d 1233, 1237 (9th Cir. 1976) (Fifth and Sixth Amendment rights to speedy trial).

- Defense of statute limitations. *See* *United States v. Littlefield*, 105 F.3d 527, 528 (9th Cir. 1997) (per curiam).

- Denial of motion to suppress. *See* *United States v. Floyd*, 108 F.3d 202, 204 (9th Cir. 1997) (observing that guilty plea was neither

conditional nor invalid), *overruled in part by* *United States v. Jacobo Castillo*, 496 F.3d 947, 949-50 (9th Cir. 2007) (en banc); *United States v. Carrasco*, 786 F.2d 1452, 1453-54 & n.2 (9th Cir. 1986) (same), *overruled in part by* *Jacobo Castillo*, 496 F.3d at 949-50 (9th Cir. 2007) (en banc).

iii. Specific Claims Not Waived by Guilty Plea

The right to appeal from rulings on the following issues survives a valid guilty plea, provided the claim can be decided based on the record:

- Claimed violation of Double Jeopardy Clause. *See* *United States v. Zalapa*, 509 F.3d 1060, 1063 (9th Cir. 2007); *United States v. Wong*, 62 F.3d 1212, 1215 n.1 (9th Cir. 1995); *Launius v. United States*, 575 F.2d 770, 771 (9th Cir. 1978) (per curiam); *Moroyoqui v. United States*, 570 F.2d 862, 863 (9th Cir. 1977).

- Challenge to guilty plea itself. *See* *United States v. Cortez*, 973 F.2d 764, 767 (9th Cir. 1992) (claim that plea was not knowing or voluntary, and was due to ineffective assistance of counsel, not waived); *see also* *United States v. Floyd*, 108 F.3d 202, 204 (9th Cir. 1997) (only errors antecedent to guilty plea are waived by the plea).

- Claimed violation of the Indictment Clause. *See* *United States v. Travis*, 735 F.2d 1129, 1131 (9th Cir. 1984) (plea of guilty to an information did not waive right to prosecution by indictment).

- Claim that charging document is insufficient or fails to state an offense. *See* *United States v. Caperell*, 938 F.2d 975, 977 (9th Cir. 1991); *United States v. Broncheau*, 597 F.2d 1260, 1262 n.1 (9th Cir. 1979).

- Claim that criminal statute is unconstitutional. *See* *United States v. Sandsness*, 988 F.2d 970, 971 (9th Cir. 1993) (claim that criminal statute was vague and overbroad not waived); *see also* *United States v. Caperell*, 938 F.2d 975, 977 (9th Cir. 1991) (noting that a claim that the "applicable statue is unconstitutional" is not waived). *But see*

United States v. Burke, 694 F.2d 632, 634 (9th Cir. 1982) (guilty plea waived vagueness claim where plea agreement established sufficient facts to preclude vagueness claim).

- Claim of vindictive prosecution amounting to violation of due process. *See* *Blackledge v. Perry*, 417 U.S. 21, 30 (1974) (observing that claim "went to the very power of the State to bring the defendant into court"); *cf.* *United States v. Montilla*, 870 F.2d 549, 552-53 (9th Cir. 1989) (finding outrageous conduct defense waived where resolution would require an evidentiary hearing and, on its face, the indictment alleged prosecutable offenses), *amended*, 907 F.2d 115 (9th Cir. 1990); *see also* *United States v. Cortez*, 973 F.2d 764, 766-67 (9th Cir. 1992) (assuming selective prosecution is a "jurisdictional" claim, it was waived because it could not be proven from either the indictment or the record at the plea stage).

e. Appeal Following Conditional Guilty Plea

A conditional guilty plea under Fed. R. Crim. P. 11(a)(2) permits a defendant to raise on appeal specified claims that would otherwise be waived by a guilty plea. *See* *United States v. Arzate-Nunez*, 18 F.3d 730, 737 (9th Cir. 1994) (plea under Rule 11(a)(2) sufficiently preserved defendant's due process claim for appeal). However, a guilty plea will not be interpreted as conditional where neither the government nor district court acquiesced in such a plea. *See* *United States v. Cortez*, 973 F.2d 764, 766 (9th Cir. 1992).

f. Appeal Following Guilty Plea under Rule 11(c)(1)(C) Agreement

Under a plea agreement made pursuant to Fed. R. Crim. P. 11(c)(1)(C), the government "agree[s] that a specific sentence or sentencing range is the appropriate disposition of the case."

When sentence is imposed following a guilty plea made pursuant to a Rule 11(c)(1)(C) plea agreement, a defendant may not appeal the sentence unless it is "greater than the sentence set forth in [the] agreement," it was "imposed in violation of the law," or it was "imposed as a result of an incorrect application of

the sentencing guidelines." 18 U.S.C. § 3742(a), (c)(1); *United States v. Littlefield*, 105 F.3d 527, 527-28 (9th Cir. 1997) (per curiam).

g. Waiver of Right to Appeal in Plea Agreement

i. Generally

An appeal waiver contained in a negotiated plea agreement generally precludes appeal on grounds encompassed by the waiver if the waiver is knowingly and voluntarily made. *See* *United States v. Martinez*, 143 F.3d 1266, 1270-71 (9th Cir. 1998) (internal quotations and citations omitted); *see also* *United States v. Cope*, 527 F.3d 944, 949 (9th Cir. 2008); *see, e.g.*, *United States v. Lococo*, 514 F.3d 860, 866 (9th Cir. 2008) (dismissing portions of appeal barred by waiver); *United States v. Blitz*, 151 F.2d 1002, 1005, 1006 (9th Cir. 1998) (dismissing appeal where defendant did not challenge validity of waiver).

If on appeal defendant challenges the validity of an appeal waiver, the court of appeals must first determine whether the waiver is valid. *See* *Cope*, 527 F.3d at 949. If the waiver is valid, the court of appeals next determines the scope of the waiver according to the language in the plea agreement to see if the appeal has been precluded. *See* *id.* at 949-50. If the waiver is valid and its scope encompasses the appeal, the appeal is dismissed; if the waiver is invalid, the court reaches the merits. *See* *id.*; *United States v. Michlin*, 34 F.3d 896, 898 (9th Cir. 1994); *United States v. DeSantiago-Martinez*, 38 F.3d 394, 395-96 (9th Cir. 1992) (order) (dismissing appeal after determining waiver was valid).

ii. Non-Waivable Issues

Certain issues remain appealable despite an otherwise valid waiver of the right to appeal. *See* *United State v. Cope*, 527 F.3d 944, 949-50 (9th Cir. 2008); *United States v. Martinez*, 143 F.3d 1266, 1269-70 (9th Cir. 1998) (right to conflict-free counsel); *United States v. Ruelas*, 106 F.3d 1416, 1418 (9th Cir. 1996) (sufficiency of indictment); *see also* *United States v. Baramdyka*, 95 F.3d 840, 843-44 (9th Cir. 1996) (dictum noting that claims of racial disparity in sentencing, sentence in excess of statutory maximum, and breach of plea agreement survive appeal waivers). *But see* *United States v. Petty*, 80 F.3d 1384, 1387 (9th Cir. 1996)

(holding that double jeopardy claim was waived where "factual basis for [] claim obviously existed before the parties' stipulation").

Where a defendant challenged the soundness of his plea allocution pursuant to Fed. R. Crim. P. 11, which went to the heart of whether his guilty plea – including his waiver of appeal – was enforceable, this court has jurisdiction to determine whether the plea was valid in order to determine if an appeal is permitted. *United States v. Portillo-Cano*, 192 F.3d 1246, 1250 (9th Cir. 1999).

iii. Scope of Appeal Waiver

(a) Generally

The court of appeals looks to the language of an appeal waiver to determine its scope. *See United State v. Cope*, 527 F.3d 944, 949-50 (9th Cir. 2008); *United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996). Plea agreements, including appeal waivers, are evaluated under contract law standards. *See United States v. Martinez*, 143 F.3d 1266, 1271 (9th Cir. 1998); *see also United States v. Petty*, 80 F.3d 1384, 1387 (9th Cir. 1996) (court of appeals would treat appeal waiver like any other contract, and interpret it to carry out the parties' intention). Ambiguities in waiver provisions are construed against the government. *See United States v. Cope*, 527 F.3d 944, 951 (9th Cir. 2008).

A waiver of appellate rights as part of a plea agreement is not rendered less than knowing and voluntary simply because a defendant and his attorney may not have recognized the strength of his potential appellate claims, where the express language of the plea agreement clearly showed that the waiver was knowing and voluntary and where the plea was accepted only after a painstaking, bilingual plea colloquy. *United States v. Nguyen*, 235 F.3d 1179, 1182 (9th Cir. 2000).

(b) Language Effective to Waive Appeal

(1) General Right to Appeal

Waiver of right to appeal on any grounds "as long as the Court does not impose a period of imprisonment greater than that recommended by the

Government" effective to waive right to appeal on grounds of lack of personal jurisdiction. *United States v. Baramdyka*, 95 F.3d 840, 843-44 (9th Cir. 1996).

A subparagraph in a plea agreement, providing that a defendant retained the right to appeal, did not preserve the defendant's right to appeal where three prior paragraphs set forth a well-developed waiver, the provision was clearly boilerplate left in by mistake, and the plea colloquy indicated a knowing and voluntary waiver. *United States v. Anglin*, 215 F.3d 1064, 1066 (9th Cir. 2000).

(2) Double Jeopardy

Waiver of "any right to further appeal" effective to waive double jeopardy claim where factual basis for claim "obviously existed before the parties' stipulation." *United States v. Petty*, 80 F.3d 1384, 1387 (9th Cir. 1996).

(3) Sentencing

Waiver of "any right to appeal the imposition of sentence" precluded appeal concerning presentence report determinations affecting defendant's sentence. *United States v. Frank*, 36 F.3d 898, 904 (9th Cir. 1994).

Waiver of right to appeal from "sentence" precluded appeal based on incorrect application of Sentencing Guidelines. *See United States v. Martinez*, 143 F.3d 1266, 1271 (9th Cir. 1998); *United States v. Schuman*, 127 F.3d 815, 817 (9th Cir. 1997) (per curiam); *United States v. Frank*, 36 F.3d 898, 904 (9th Cir. 1994); *United States v. Bolinger*, 940 F.2d 478, 479-80 (9th Cir. 1991); *see also United States v. Khaton*, 40 F.3d 309, 311-12 (9th Cir. 1994) (concluding that waiver of the right to appeal "any sentence within the discretion of the district judge" precluded appeal disputing district court's "[f]aithful adherence to [Sentencing Guidelines'] schema"); *United States v. Michlin*, 34 F.3d 896, 901 (9th Cir. 1994) (concluding that waiver of appeal from "sentence ultimately imposed by the Court, if within the guideline range as determined by the Court" was effective to waive appeal claiming "incorrect applications of the Sentencing Guidelines").

Waiver of right to appeal sentence within a particular range precluded appeal from sentence at high end of range despite defendant's argument that sentence was within range only because of credit for time served. *See United States v. Scolari*,

72 F.3d 751, 752 (9th Cir. 1995); *United States v. Navarro-Botello*, 912 F.2d 318, 319-20, 322 (9th Cir. 1990).

Waiver in plea agreement of "the right to appeal any sentence imposed by the district judge" precluded appeal of sentence based on law that became effective after plea but before sentencing. *United States v. Johnson*, 67 F.3d 200, 202 (9th Cir. 1995).

Waiver of right to appeal "any pretrial issues or any sentencing issues" precluded appeal contending district court should have held evidentiary hearing on new, exculpatory evidence entitling defendant to modification of sentence. *United States v. Abarca*, 985 F.2d 1012, 1013 (9th Cir. 1993).

A waiver of the right to appeal from an "illegal sentence" precluded an appeal based on the district court's failure to state the reasons for the particular sentence it imposed. *United States v. Vences*, 169 F.3d 611, 613 (9th Cir. 1999).

(c) Language Not Effective to Waive Appeal

(1) Deviation from Sentencing Guidelines "Schema"

Waiver of right to appeal "any sentence within the discretion of the district judge" did not preclude appeal based on "[o]bviously improper deviations" from "schema" of Sentencing Guidelines. *United States v. Khaton*, 40 F.3d 309, 311 (9th Cir. 1994) (but appeal disputing district court's "[f]aithful adherence to [Sentencing Guidelines] schema," precluded).

(2) Incorrect Application of Sentencing Guidelines

Waiver of right to appeal any sentence "within the Sentencing Guidelines range which the district judge determined to be applicable in [defendant's] case," did not preclude appeal from upward departure. *United States v. Haggard*, 41 F.3d 1320, 1325 (9th Cir. 1994).

(3) Procedure at Sentencing

Waiver of "any right to further appeal" ineffective to waive claim that district court failed at resentencing to verify defendant had reviewed presentence reports with attorney, where remarks of prosecutor suggested that waiver had limits, error was substantial and unforeseeable and arose only after the stipulation. *United States v. Petty*, 80 F.3d 1384, 1387 (9th Cir. 1996).

(4) Restitution Order Imposed at Sentencing

Waiver of "right to appeal any sentence . . . within the statutory minimum specified above" was ineffective to waive defendant's right to appeal restitution order. *United States v. Zink*, 107 F.3d 716, 717-18 (9th Cir. 1997).

Waiver of right to appeal "sentence," defined in terms of calculations under Sentencing Guidelines, did not preclude appeal of restitution order which is calculated under a separate, statutory standard. *United States v. Catharine*, 55 F.3d 1462, 1464-65 (9th Cir. 1995).

A waiver of the "right to appeal all matters pertaining to this case and any sentence imposed" did not bar the defendant's claim that money forfeited by the defendant should be set off against restitution, when the defendant claimed that the restitution was imposed in violation of the Victim and Witness Protection Act. *United States v. Johnston*, 199 F.3d 1015, 1022-23 (9th Cir. 1999).

A waiver of the right to appeal a restitution order is not knowing and voluntary when the plea agreement is ambiguous regarding the amount of restitution. *United States v. Phillips*, 174 F.3d 1074, 1076 (9th Cir. 1999).

(5) Withdrawal of Guilty Plea

Waiver of "any right to appeal the imposition of sentence" did not preclude appeal from denial of motion to withdraw guilty plea. *United States v. Frank*, 36 F.3d 898, 904 (9th Cir. 1994).

3. SCOPE OF APPEAL BY GOVERNMENT

a. Interlocutory Appeal from Successive Orders

A government appeal from an order clarifying or expanding a previous discovery order may suffice to bring both orders up for review. *See* *United States v. Dominquez-Villa*, 954 F.2d 562, 565 (9th Cir. 1992) (appeal from second order permitted where first order did not specify that noncompliance would result in suppression of evidence); *United States v. Humphries*, 636 F.2d 1172, 1175-77 (9th Cir. 1980) (appeal from second order permitted where scope of initial suppression order unclear, and government presented different evidence in hearing on second motion).

b. Effect of Contents of Notice of Appeal

A mistake in designating the order being appealed "does not bar an appeal if the intent to appeal a specific judgment can be inferred and the appellee is not prejudiced or misled by the mistake." *United States v. Adrian*, 978 F.2d 486, 489 (9th Cir. 1992) (citations omitted) (appeal from denial of motion to stay encompassed subsequent order dismissing action without prejudice to permit appeal), *overruled in part on other grounds by* *United States v. W.R. Grace*, 526 F.3d 499, 506 (9th Cir. 2008) (en banc).

H. EFFECT OF APPEAL ON DISTRICT COURT JURISDICTION

1. EFFECT OF INTERLOCUTORY APPEALS

a. Appeal by Defendant

i. General Rule

Where a defendant claims on interlocutory appeal a right not to be tried, the district court ordinarily loses jurisdiction to proceed from the time the notice of appeal is filed until the appeal is resolved. *See* *United States v. Claiborne*, 727 F.2d 842, 850-51 (9th Cir. 1984) (per curiam) (finding district court's decision to hear pre-trial motions after valid interlocutory appeal had been taken was harmless error but suggesting that orders be reentered); *see also* *United States v. Powell*, 24

F.3d 28, 31 (9th Cir. 1994) (stating in dictum that the "divesture rule is clearly applicable in a case where the defendant claims a right not to be tried at all").

The district court is not deprived of jurisdiction to proceed with trial where on interlocutory appeal the defendant does not raise a right not to be tried. *See United States v. Ray*, 731 F.2d 1361, 1369 (9th Cir. 1984) (appeal of order denying motion to modify restraining order freezing assets).

ii. Exceptions

(a) Written Frivolousness Finding

The divestiture of jurisdiction rule does not apply where defendant appeals from denial of a motion the district court finds in writing to be frivolous, even though the motion asserts a right not to be tried. *See United States v. LaMere*, 951 F.2d 1106, 1108-09 (9th Cir. 1991) (per curiam).

(b) Appeal from Non-Appealable Order

The district court is not deprived of jurisdiction to proceed where appeal is taken from an order that is not subject to interlocutory appeal. *See United States v. Ray*, 731 F.2d 1361, 1369 (9th Cir. 1984) (appeal alleging vindictive prosecution); *United States v. Garner*, 663 F.2d 834, 837-38 (9th Cir. 1981) (appeal from order denying pretrial motion to dismiss indictment for grand jury irregularities); *see also United States v. Burt*, 619 F.2d 831, 835 (9th Cir. 1980) (appeal from clerk's minutes noting ruling on motions, where district court did not intend rulings to be final).

b. Appeal by Government

The government's appeal under 18 U.S.C. § 3731 from a pretrial order suppressing evidence does not deprive the district court of jurisdiction to dismiss the indictment for failure to prosecute. *See United States v. Gatto*, 763 F.2d 1040, 1049-50 (9th Cir. 1985); *see also United States v. Emens*, 565 F.2d 1142, 1144 (9th Cir. 1977) (in appropriate cases, district court has power to dismiss indictment while interlocutory appeal is pending).

2. EFFECT OF APPEAL AFTER SENTENCING

An appeal from a final judgment divests the district court of jurisdiction to enter a second sentencing order, and the court of appeals lacks jurisdiction to review the second order. *United States v. Najjor*, 255 F.3d 979, 983 (9th Cir. 2001).

a. Effect on Trial of Severed Counts

Ordinarily, an appeal from conviction on certain counts severed from an indictment will not divest the district court of jurisdiction to try and sentence defendant on the remaining counts. *See United States v. Powell*, 24 F.3d 28, 30-32 (9th Cir. 1994) (district court retained jurisdiction over remaining counts where sentence imposed as to all tried counts and lack of common issues eliminated potential for confusion or waste of resources).

b. Effect on Motion for New Trial under Fed. R. Crim. P. 33

Generally, the pendency of an appeal does not deprive the district court of jurisdiction to rule on new trial motions under Fed. R. Crim. P. 33. *See United States v. Arnpriester*, 37 F.3d 466, 467 (9th Cir. 1994) (motion based on newly discovered evidence of judicial bias); *see also United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984) (motion based on ineffective assistance of counsel).

If the district court is inclined to grant a motion for new trial, however, it must first obtain a remand of the case. *See* Fed. R. Crim. P. 33 ("If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case."); *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984) (noting that district court could either deny motion on merits or certify intent to grant motion so that court of appeals could entertain motion to remand).

c. Effect on Entry of Factual Findings under Fed. R. Crim. P. 32

The filing of a post-sentence notice of appeal divests the district court of jurisdiction to enter findings of fact under Fed. R. Crim. P. 32(i)(3). *See United*

States v. Edwards, 800 F.2d 878, 883-84 (9th Cir. 1986) ("Rule 32(c)(3)(D) [currently Rule 32(i)(3)] clearly contemplates that the determinations regarding disputed factual material will be made prior to sentencing.") Note that since *Edwards*, Rule 32 has been amended.

d. Effect on Correction of Sentence under Fed. R. Crim. P. 35

The filing of a notice of appeal divests the district court of jurisdiction to correct an invalid sentence under Fed. R. Crim. P. 35(a). *See United States v. Ortega-Lopez*, 988 F.2d 70, 72 (9th Cir. 1993) (district courts are to correct sentences invalidated on appeal only upon remand of the case). However, the filing of a notice of appeal does not divest the district court of jurisdiction to correct a sentence within seven days of imposition for clear error under Fed. R. Crim. P. 35(a). *See* Fed. R. App. P. 4(b).

e. Effect on Collateral Attack on Proceedings

Generally, "a district court should not entertain a habeas corpus petition while there is an appeal pending in this court or in the Supreme Court." *United States v. Deeb*, 944 F.2d 545, 548 (9th Cir. 1991) (affirming denial of § 2255 motion without prejudice in part because, while motion sought a new trial and defendant only challenged sentence on direct appeal, district court was not informed that direct appeal did not involve a challenge to the conviction); *accord Feldman v. Henman*, 815 F.2d 1318, 1321 (9th Cir. 1987) (district court had no authority to entertain federal prisoner's habeas corpus petition filed under 28 U.S.C. § 2241 where prisoner's petition for certiorari on direct appeal from conviction was still pending before Supreme Court).

However, "[t]he District Court may entertain a collateral motion during the pendency of a district appeal if 'extraordinary circumstances' outweigh the considerations of administrative convenience and judicial economy." *United States v. Taylor*, 648 F.2d 565, 572 (9th Cir. 1981) (finding that district court erred in dismissing coram nobis motion while direct appeal pending where "collateral claim casts . . . a dark shadow on a pivotal aspect of the direct appeal and, at the same time, implicates the fundamental fairness of the trial and propriety of the government's actions"); *see also Jack v. United States*, 435 F.2d 317, 318 (9th Cir.

1970) (per curiam) (noting that only under the "most unusual circumstances" is a defendant in a federal criminal prosecution entitled to have a direct appeal and a § 2255 proceeding considered simultaneously, but evaluating appeal on merits despite lack of such circumstances).

I. MANDAMUS REVIEW

1. GENERAL PRINCIPLES

Cross-reference: II.D (regarding mandamus petitions generally).

a. Jurisdictional Basis for Writs

The court of appeals has jurisdiction under 28 U.S.C. § 1651 to issue a writ of mandamus in any case for which it would have power to entertain an appeal at some of the proceedings. *United States v. Barker*, 1 F.3d 957, 959 (9th Cir. 1993), *amended*, 20 F.3d 365 (9th Cir. 1994); *California v. Mesa*, 813 F.2d 960, 962 (9th Cir. 1987), *aff'd*, 489 U.S. 121 (1989).

b. General Standards

Generally, the standards applied in civil cases also apply in criminal cases where a party petitions for writ relief. *See United States v. W.R. Grace*, 504 F.3d 745, 757 (9th Cir. 2007) (listing five factors); *Portillo v. United States Dist. Court*, 15 F.3d 819, 822 (9th Cir. 1994) (per curiam) (reiterating *Bauman* factors in reviewing defendant's petition); *United States v. Barker*, 1 F.3d 957, 959 (9th Cir. 1993) (same, in reviewing government petition).

Mandamus is traditionally used only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Will v. United States*, 389 U.S. 90, 95 (1967) (internal quotation marks citation omitted); *Barker*, 1 F.3d at 959; *Valenzuela-Gonzalez v. United States Dist. Court*, 915 F.2d 1276, 1278 (9th Cir. 1990).

The policy against piecemeal review, which underlies the final judgment rule and makes writ relief exceptional, "applies with particular force in criminal

proceedings due to the disruption interlocutory review may engender." *Oregonian Publ'g. Co. v. United States Dist. Court*, 920 F.2d 1462, 1464 (9th Cir. 1990); *see also Will*, 389 U.S. at 96 (observing that the "general policy against piecemeal appeals takes on added weight in criminal cases, where the defendant is entitled to a speedy resolution of the charges against him").

To issue a writ, the court of appeals must be "firmly convinced that the district court has erred," and that the petitioner's right to the writ is "clear and indisputable." *Valenzuela-Gonzalez*, 915 F.2d at 1279 (internal quotation marks and citation omitted); *see also Morgan v. United States Dist. Ct.*, 506 F.3d 705, 712 (9th Cir. 2007); *Barker*, 1 F.3d at 959.

A writ will not issue where appellate review is available. *See United States v. Dominguez-Villa*, 954 F.2d 562, 564 (9th Cir. 1992) (rejecting government's request for mandamus because appellate jurisdiction existed under 18 U.S.C. § 3731); *see also United States v. Higuera-Guerrero (In re Copely Press, Inc.)*, 518 F.3d 1022, 1025-26 (9th Cir. 2008) (treating the government's petition for a writ of mandamus as an appeal under 28 U.S.C. § 1291). *But cf. Barker*, 1 F.3d at 958-59 (exercising mandamus powers where appellate jurisdiction over government appeal was unclear).

2. DEFENDANTS' PETITIONS

Defendants' writ petitions have presented the following issues:

a. Appointment of Public Defender

See United States v. Hitchcock, 992 F.2d 236, 239 (9th Cir. 1993) (per curiam) (mandamus not available to review order denying appointment of counsel at public expense where the order is based on a refusal to submit financial information unconditionally).

b. Arraignment by Closed-Circuit Television

See Valenzuela-Gonzalez v. United States Dist. Court, 915 F.2d 1276, 1281 (9th Cir. 1990) (granting defendant's petition from order that his arraignment be conducted by closed-circuit television).

c. Authority of Government Attorney

See *United States v. Symms*, 960 F.2d 847, 849 (9th Cir. 1992) (order rejecting defendant's challenge to authority of government attorney who obtained indictment is not reviewable on mandamus).

d. Bail in Habeas Cases

See *Land v. Deeds*, 878 F.2d 318, 318-19 (9th Cir. 1989) (per curiam) (construing appeal from order denying bail pending a decision on state prisoner's habeas petition as a petition for writ of mandamus and denying petition because district court's order was not clearly erroneous).

e. Constitutionality of Death Penalty Provision

See *United States v. Harper*, 729 F.2d 1216, 1221-24 (9th Cir. 1984) (pretrial order holding death penalty provision constitutional reviewable on defendant's petition for writ of mandamus in part because availability of death penalty may make guilty plea less likely such that government may have to disclose more information during an espionage trial at the risk of compromising national security).

f. Dangerousness of Defendant

See *Weber v. United States Dist. Court*, 9 F.3d 76, 79 (9th Cir. 1993) (per curiam) (granting defendant's petition for relief order staying entry of final sentence and returning defendant to a medical facility for assessment pursuant to 18 U.S.C. § 4246).

g. Disqualification of Defense Counsel

See *United States v. Greger*, 657 F.2d 1109, 1114-15 (9th Cir. 1981) (order disqualifying defendant's counsel did not warrant mandamus relief, although court glanced at merits and noted that disqualification order appeared consistent with Ninth Circuit law).

h. Grand Jury Irregularities

See *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943) (order striking defendants' pleas in abatement alleging grand jury irregularity in returning indictment – specifically, that the grand jury could not consider the subject matter of the indictment – is reviewable only on appeal and not by mandamus).

i. Restraint Order Directed at Counsel

See *Levine v. United States Dist. Court*, 764 F.2d 590, 601 (9th Cir. 1985) (granting writ petition of criminal defendant and his attorneys seeking review of order restraining attorneys from communicating with press).

j. Sealing of Defendant's Financial Information

See *United States v. Hitchcock*, 992 F.2d 236, 239 (9th Cir. 1993) (per curiam) (mandamus not available to review order denying defendants' motion to submit under seal financial information necessary to establish right to appointed counsel, or to grant immunity for such information).

k. Speedy Trial Act Violation

See *United States v. Mehrmanesh*, 652 F.2d 766, 770-71 (9th Cir. 1980) (order denying defendants' motion to dismiss indictment based on Speedy Trial Act violation not subject to mandamus review, as district court's interpretation of statute resolved a close question). *But cf.* *id.* at 770 (dictum that district court's simple miscounting of days under Speedy Trial act would warrant mandamus relief).

l. Transfer

See *United States v. French*, 787 F.2d 1381, 1384-85 (9th Cir. 1986) (denying petition for mandamus seeking review of order transferring case back to transferor court where court of appeals not "firmly convinced" district court erred, claim would not evade review on appeal, and defendant would not endure undue hardship).

m. Urinalysis

See *Portillo v. United States Dist. Court*, 15 F.3d 819, 824 (9th Cir. 1994) (per curiam) (granting defendant's petition from order requiring him to submit to urine testing during preparation of presentence report).

n. Venue

See *Parr v. United States*, 351 U.S. 513, 520 (1956) (denying petitions for mandamus and prohibition to require trial in particular venue based on district court's initial order transferring case to desired venue, subsequent order dismissing indictment and issuance of superceding indictment in a third venue).

3. GOVERNMENT PETITIONS

Cross-reference: VIII.B.2.e (regarding prohibition on government's use of writ petition to circumvent Double Jeopardy Clause).

Government writ petitions have presented the following issues:

a. Arrest Warrants

See *Ex Parte United States*, 287 U.S. 241, 249-51 (1932) (issuing writ where district court should have issued arrest warrant "as a matter of course" following return of indictment that was "fair upon its face"); *see also* *Will v. United States*, 389 U.S. 90, 97-98 (1967) (endorsing *Ex Parte United States* while denying writ relief in pending case).

b. Bill of Particulars

See *Will v. United States*, 389 U.S. 90, 98 (1967) (government not entitled to writ relief from a district court order granting a defendant's pretrial motion for a bill of particulars).

c. Defenses

See *United States v. United States Dist. Court*, 858 F.2d 534, 537 (9th Cir. 1988) ("government's claim that the district court has permitted an inappropriate criminal defense presents a paradigmatic case for mandamus" because order allowing admission of evidence is not appealable under § 3731 and government could not appeal from and would not be prejudiced if defendants were convicted despite district court's error).

d. Discovery

See *United States v. United States Dist. Court*, 717 F.2d 478, 481-82 (9th Cir. 1983) (granting government's mandamus petition where, during criminal proceeding, district court ordered government to produce documents for in camera inspection in response to defendant's document request under Freedom of Information Act).

e. Removal

See *California v. Mesa*, 813 F.2d 960, 962-64 (9th Cir. 1987) (state may seek writ of mandamus to test propriety of removal of state prosecution to federal court), *aff'd*, 489 U.S. 121 (1989).

f. Splitting Elements of Crime for Trial

See *United States v. Barker*, 1 F.3d 957, 959-60 (9th Cir. 1993) (granting government's petition for review of order splitting elements of a crime into two parts for purposes of trial, where government sought review before jury was sworn and while further trial proceedings were stayed), *amended*, 20 F.2d 365 (9th Cir. 1994).

4. THIRD-PARTY PETITIONS

a. Petition by Media Seeking Access

Cross reference: II.D.4.f.

b. Petition by Material Witness Seeking Release

Writ of mandamus issued, directing that testimony of material witnesses be preserved by videotaped deposition under 18 U.S.C. § 3144, so that witnesses could be released from detention. *See Torres-Ruiz v. United States Dist. Court*, 120 F.3d 933, 936 (9th Cir. 1997) (per curiam).

J. MOOTNESS IN CRIMINAL APPEALS

Under certain circumstances, the following events may moot a criminal appeal:

1. LAPSE OF GRAND JURY TERM

Where the term of the grand jury lapses while an appeal by a witness held in civil contempt is pending, the appeal is mooted because the civil contempt order "lacks further effect." *Doe v. United States (In re Grand Jury Proceedings)*, 863 F.2d 667, 668 (9th Cir. 1988) (remanded for vacation of contempt order).

However, statutory expedited review procedures generally permit appeals by recalcitrant witnesses to be adjudicated during the grand jury term. *See id.* at 669-70. Moreover, issues raised in a mooted appeal may be raised again in later proceedings. *See DeMassa v. United States (In re Grand Jury Proceedings Klayman)*, 760 F.2d 1490, 1491-92 (9th Cir. 1985) (noting that attorney-client privilege issue could be raised again in pretrial motions).

2. RETURN OF INDICTMENT

An appeal from an order denying a motion to quash a subpoena is moot where the subpoenaed materials have been disclosed to the grand jury and the movant has been indicted. *See Doe v. United States (In re Grand Jury Subpoena Dated June 5, 1985)*, 825 F.2d 231, 234-35 (9th Cir. 1987) (noting that appeal not moot where subpoenaed materials disclosed to grand jury but movant not yet indicted and order returning documents would reduce risk of future indictment).

3. ISSUANCE OF SUPERCEDING CHARGES

Generally, a challenge to the legal sufficiency of an indictment is mooted when the indictment is dismissed and replaced by an information charging different offenses. *See* *United States v. Scott*, 884 F.2d 1163, 1164 (9th Cir. 1989) (per curiam). *But cf.* *id.* at 1165 (defendant who pleaded guilty to information under Fed. R. Crim. P. 11(a)(2) on condition that he be allowed to appeal denial of motion to dismiss prior indictment could change indictment).

4. CONVICTION OF DEFENDANT

A conviction moots a defendant's challenges regarding pretrial detention. *See* *United States v. Haliburton*, 870 F.2d 557, 562 (9th Cir. 1989) (conviction and sentence mooted question whether district court erred in terminating defendant's release during course of trial); *see also* *United States v. Freie*, 545 F.2d 1217, 1223 (9th Cir. 1976) (per curiam) (stating that defendant's "contention of error with respect to the pretrial bail proceedings is not assignable to reverse a conviction").

5. RELEASE OF DEFENDANT FROM CONFINEMENT

a. Bail Issues

A challenge to the denial of bail pending appeal is moot where the defendant has served the term of imprisonment and been released. *See* *United States v. Pacheco*, 912 F.2d 297, 305 (9th Cir. 1990).

A challenge to the grant of bail pending appeal from the grant of a habeas petition is not mooted by a decision affirming in part and reversing in part the grant of the petition where defendant's sentence on conviction for which writ issued was reversed. *See* *Marino v. Vasquez*, 812 F.2d 499, 507 & n.10 (9th Cir. 1987).

b. Defendants' Challenges to Merits of Conviction

Generally, courts "presume that a wrongful criminal conviction has continuing collateral consequences" sufficient to prevent mootness of challenges to the conviction upon expiration of a sentence. *Spencer v. Kemna*, 523 U.S. 1, 7-11 (1998) (discussing presumption in state habeas appeal and citing to cases involving

both direct criminal appeals and collateral attacks); *see also* *Fiswick v. United States*, 329 U.S. 211, 222 (1946) (determining that appeal of conviction was not moot despite expiration of sentence where conviction could burden alien defendant in various immigration and naturalization matters and, "unless pardoned, [he would] carry through life the disability of a felon [and] might lose certain civil rights" (footnotes omitted)); *United States v. Lee*, 720 F.2d 1049, 1054 (9th Cir. 1983) (concluding that attorney's direct appeal from criminal contempt conviction was not moot, although attorney had served one-day sentence, because "a criminal conviction has collateral consequences"); *Wilson v. Terhune*, 319 F.3d 477, 479-80 (9th Cir. 2003) (habeas petition challenging underlying conviction is not moot because petitioner has been released from custody; however, some collateral consequences of conviction must exist for suit to be maintained).

The Ninth Circuit declined to apply this presumption in a direct appeal involving a fine for contempt. *See* *Cancino v. Craven*, 511 F.2d 1371, 1373 (9th Cir. 1975) (dismissing as moot attorney's appeal from a contempt order where attorney did not seek stay of order, paid $50 fine, and indictment "did not amount to much," but indicating result may be different if attorney had served alternate sentence of one night in jail).

c. Government Challenge to Reversal of Conviction

> *Cross-reference*: VIII.J.7 (regarding the effect on government appeals of defendants' fugitive status).

Government challenges to decisions reversing convictions generally survive a defendant's lawful release from confinement. *See* *United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983) (defendants' deportation did not moot appeal from order reversing convictions because reversal of that order would raise possibility of extradition, arrest, and imprisonment upon re-entry); *United States v. Campos-Serrano*, 404 U.S. 293, 294 n.2 (1971) (defendants' departure from country did not moot appeal from order reversing conviction where departure was in accord with sentence and violation of probation conditions would subject defendant to imprisonment under continuing criminal sentence); *cf.* *United States v. Valdez-Gonzalez*, 957 F.2d 643, 646-47 (9th Cir. 1992) (although defendants had served sentences and been deported, government's appeal of downward sentencing departures not moot where government could seek extradition or, upon

their rearrest in this country, defendants' supervised release time could be converted to incarceration time), *superseded by statute as stated in* *United States v. Plancarte-Alvarez*, 366 F.3d 1058, 1063 (9th Cir. 2004).

d. Challenge to Sentences

A defendant's appeal from his sentence becomes moot upon completion of that sentence. *United States v. Gomez-Gonzalez*, 295 F.3d 990 (9th Cir. 2002). That contingencies must occur to subject a defendant to sentencing conditions does not moot the defendant's challenge to such conditions. *See* *United States v. Barsumyan*, 517 F.3d 1154, 1162 (9th Cir. 2008); *see also* *United States v. Figueroa-Ocampo*, 494 F.3d 1211, 1216-17 (9th Cir. 2007) (holding that a challenge to sentence length is not mooted while the sentence includes a term of supervised release).

i. Initial Sentences

See Office of Staff Attorneys' Sentencing Guidelines Outline.

ii. Additional Sentences Imposed on Revocation of Probation

A defendant's appeal from a sentence for probation violation is not mooted by completion of the sentence where a future district court might weigh the revoked probation and resulting sentence in deciding discretionary issues and, likewise, a future state court might consider the sentence in imposing a new term of imprisonment. *United States v. Palomba*, 182 F.3d 1121, 1123 (9th Cir. 1999); *Spencer v. Kemna*, 523 U.S. 1, 13-14 (1998) (in case involving state prisoner's habeas petition, Court declined to presume collateral consequences stemming from parole revocation, holding that possible use of the revocation as "one factor" in future proceedings, or possible use in future criminal trials or sentencing is too discriminatory or speculative to constitute "collateral consequences" sufficient to prevent mootness). In *Palomba*, 182 F.3d at 1123, this court recognized that *United States v. Schmidt*, 99 F.3d 315 (9th Cir. 1996) (a sentence for probation violation can be challenged, even if it has been completely served, if there might be collateral consequences for a defendant in any possible future sentencing), had been superseded by *Spencer*, 523 U.S. at 14 (rejecting as moot a challenge to an

allegedly erroneous parole revocation because the defendant had already served his entire sentence).

e. Challenges to Competency Proceedings

A defendant's challenge to revocation of conditional release under 18 U.S.C. § 4246(d), following treatment for mental impairment, is not necessarily mooted where defendant is again conditionally released and then reconfined, the short length of his detentions was "not likely to persist long enough to allow for completion of appellate review," defendant remained subject to the conditional release order at issue, and issue of statutory construction was of continuing and public importance. *United States v. Woods*, 995 F.2d 894, 896 (9th Cir. 1993).

6. DEPORTATION OF DEFENDANT

A defendant's subsequent deportation will not moot a government appeal regarding drug quality that should have been used in calculating defendant's sentence because the defendant might return to the United States, either voluntarily or otherwise. *See* *United States v. Plancarte-Alvarez*, 366 F.3d 1058, 1063-64 (9th Cir. 2004).

7. DEFENDANTS' FUGITIVE STATUS

a. Government Appeals

Cross-reference: VIII.J.5 (regarding the effect on government appeals of defendant's service of sentence or other lawful release from confinement).

i. Bail Issues

A defendant's pretrial flight will not moot a government appeal regarding whether release was required because "resolution of the dispute determines the course of proceedings if and when he is rearrested on the charges now pending." *United States v. Montalvo-Murillo*, 495 U.S. 711, 715 (1990) (appeal concerned whether defendant's release was required due to an untimely bail hearing).

ii. Issues Concerning Reversal of Conviction

Where a government appeal concerns an order reversing a conviction, the defendant's fugitive status will not moot the case because a further reversal may lead to reinstatement of the conviction. *See* *United States v. Sharpe*, 470 U.S. 675, 681 n.2 (1985) (concerning government appeal from reversal of convictions where defendants became fugitives following grant of certiorari).

b. Appeals by Defendants (Fugitive Disentitlement Doctrine)

i. General Rule Regarding Escape While Appeal is Pending

"The fugitive disentitlement doctrine empowers [the court] to dismiss the appeal of a defendant who flees the jurisdiction of the United States after timely appealing." *Parretti v. United States*, 143 F.2d 508, 510 (9th Cir. 1998) (en banc); *United States v. Plancarte- Alvarez*, 366 F.3d 1058, 1064 (9th Cir. 2004) (fugitive disentitlement doctrine gives the court discretion to dismiss an appeal by a criminal defendant who is a fugitive); *see, e.g.;* *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970) (per curiam) (dismissing appeal "after the convicted defendant who ha[d] sought review escape[d] from the restraints placed upon him pursuant to the conviction"); *Parretti*, 143 F.2d at 511 (withdrawing three-judge panel opinion and dismissing appeal after defendant fled from the United States while his appeal was pending); *United States v. Freelove*, 816 F.2d 479, 480 (9th Cir. 1987) (concluding that defendant's escape disentitled him from demanding appeal as of right).

The Supreme Court has "consistently and unequivocally approve[d] dismissal as an appropriate sanction when a prisoner is a fugitive during the ongoing appellate process.'" *Parretti*, 143 F.2d at 511 (quoting *Ortega-Rodriguez v. United States*, 507 U.S. 234, 242 (1993)). However, "dismissal of fugitive appeals is always discretionary." *Ortega-Rodriguez*, 507 U.S. at 249 n.23 (noting also that "appellate courts may exercise th[eir] discretion by developing generally applicable rules to cover specific, recurring situations").

ii. Dismissal Not Constitutionally Required

Upon a defendant's escape, his or her appeal remains an adjudicable case or controversy but disentitles him or her from calling upon judicial resources for determination of claims. *See* *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970) (per curiam); *United States v. Van Cauwenberghe*, 934 F.2d 1048, 1054 (9th Cir. 1991) (disentitlement doctrine not jurisdictional but based on equitable considerations).

iii. Conditional Dismissals

Dismissal under the disentitlement doctrine is usually effective immediately, and need not await expiration of the court's term or a fixed period of time. *See* *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970) (per curiam); *United States v. $129,374 in United States Currency*, 769 F.2d 583, 587 (9th Cir. 1985) ("[A] court clearly has the power to dismiss the appeal without granting any . . . grace period.").

Nevertheless, a grace period has been indicated in some cases. *See* *United States v. Freelove*, 816 F.2d 479, 480 (9th Cir. 1987) (appeal dismissed subject to reinstatement should defendant surrender within 42 days of dismissal order); *United States v. Macias*, 519 F.2d 697, 698 (9th Cir. 1975) (leaving open possibility for a motion to reinstate within 30 days if defendant submits to district court jurisdiction).

iv. Application in Cases Where Defendants Return to Custody Prior to Appeal

Where a defendant has been a fugitive at some time prior to filing his or her notice of appeal, that fact alone is not sufficient to disentitle the defendant to an appeal. *See* *Ortega-Rodriguez v. United States*, 507 U.S. 234, 247 (1993).

A defendant whose attorney files a notice of appeal in his or her absence is subject to a straightforward application of the disentitlement doctrine. *See* *id.* at 243 n.12.

However, a defendant who returns before filing an appeal is subject to the disentitlement doctrine only if there is "some connection" between his or her pre-appeal fugitive status and the subsequent appeal. *Id.* at 249. The Supreme Court has set out three such connections:

- "[T]he Government would be prejudiced in locating witnesses and presenting evidence at retrial after a successful appeal" by defendant. *Id.*

- "[A] defendant's misconduct at the district court level might somehow make [a] meaningful appeal impossible." *Id.* at 250.

- "[A] defendant's misconduct at the district court level disrupts the appellate process so that an appellate sanction is reasonably imposed," such as where the court of appeals would otherwise be forced to hear an appeal that would have been consolidated with an earlier appeal by co-defendants. *Id.* (internal quotation marks and citation omitted).

In *United States v. Sudthisa-Ard*, 17 F.3d 1205 (9th Cir. 1994), the court dismissed an appeal where all three connections existed. *Id.* at 1207-09 (government stipulation established prejudice; court had previously heard appeal by co-defendant, whose conviction was reversed; and thirteen-year delay preceding appeal resulted in loss or destruction of necessary documents).

However, the court of appeals has declined to apply the disentitlement doctrine to a defendant whose conviction may have been based on an unconstitutional presumption. *See United States v. Tunnell*, 650 F.2d 1124, 1126 (9th Cir. 1981) (stating that although "[t]he government [was] justifiably concerned about their [sic] potential difficulty in retrying a case after twelve years[,] . . . such does not suffice to warrant sustaining a conviction which might have been based on an unconstitutional presumption.").

8. DEATH OF DEFENDANT (Abatement Doctrine)

The death of a defendant pending appeal abates the appeal and all proceedings in the prosecution from its inception. *See United States v. Oberlin*, 718 F.2d 894, 895 (9th Cir. 1983); *United States v. Bechtel*, 547 F.2d 1379, 1380

(9th Cir. 1977) (per curiam). The rule of abatement also applies where a defendant died before a notice of appeal was filed, where at the time of death the defendant possessed an appeal of right from a conviction. *See* *Oberlin*, 718 F.2d at 896.

The rule of abatement extends to appeals in forfeiture actions under 21 U.S.C. § 848 where the forfeiture was pleaded in an indictment and tried in criminal proceedings. *See* *id.* *But cf.* *United States v. $84,740.00 Currency*, 981 F.2d 1110, 1113-15 (9th Cir. 1992) (abatement does not apply in appeals concerning civil forfeitures).

The proper procedure where abatement occurs is to dismiss the appeal and remand for the district court to vacate the judgment and dismiss the indictment. *See* *Oberlin*, 718 F.2d at 896; *see also* *Bechtel*, 547 F.2d at 1380.

IX. CONSTITUTIONAL LIMITATIONS ON FEDERAL JURISDICTION

A. STANDING

1. GENERAL PRINCIPLES

Standing is jurisdictional and cannot be waived. *See* *United States v. Hays*, 515 U.S. 737, 742 (1995). The doctrine of standing encompasses both constitutional requirements and prudential considerations. *See* *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982); *Sahni v. American Diversified Partners*, 83 F.3d 1054, 1057 (9th Cir. 1996).

The same principles of standing that apply in district court apply in the court of appeals. *See* *Wolford v. Gaekle (In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.)*, 33 F.3d 29, 30 (9th Cir. 1994).

a. Constitutional Requirements

At an "irreducible minimum," Article III requires that: (1) the party invoking federal jurisdiction have suffered some actual or threatened injury; (2) the injury be fairly traceable to the challenged conduct; and (3) a favorable decision would likely redress or prevent the injury. *See* *Valley Forge Christian College v.*

Americans United for Separation of Church & State, Inc., 454 U.S. 463, 472 (1982); *Sahni v. American Diversified Partners*, 83 F.3d 1054, 1057 (9th Cir. 1996).

To satisfy Article III's standing requirements, a plaintiff must show: (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001).

b. Prudential Limitations

The prudential limitations on federal court jurisdiction dictate that: (1) a party must assert his or her own legal rights and interests, not those of others; (2) the courts will not adjudicate "generalized grievances" (i.e. "abstract questions of wide public significance"); and (3) a party's claims must fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 463, 474-75 (1982) (citations omitted).

2. STANDING TO APPEAL

a. Party Status

As a general rule, a person has standing to appeal if: (1) he or she was a party to the action at the time judgment was entered, and (2) he or she is aggrieved by the decision being challenged on appeal. *See Hoover v. Switlik Parachute Co.*, 663 F.2d 964, 966 (9th Cir. 1981).

i. Intervenors

> *Cross-reference*: II.C.19 (regarding the appealability of orders denying motions to intervene).

"An intervenor, whether by right or by permission, normally has the right to appeal an adverse final judgment." *Stringfellow v. Concerned Neighbors In*

Action, 480 U.S. 370, 375-76 (1987) (citations omitted). In fact, an intervenor has the right to appeal even absent an appeal by the party on whose side he or she intervened as long as the intervenor satisfies the general requirements for standing; injury in fact, causation and redressability. *See* *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1398-99 (9th Cir. 1995) (intervention as of right); *Didrickson v. United States Dep't of the Interior*, 982 F.2d 1332, 1337-38 (9th Cir. 1992) (permissive intervention); *see also* *American Games, Inc. v. Trade Products, Inc.*, 142 F.3d 1164, 1166-67 (9th Cir. 1998) (permitting intervenor to appeal from district court order vacating judgment after controversy between original parties was mooted by effective merger of the two companies).

Alternatively, a person may be permitted to intervene solely for purposes of appeal following entry of judgment if he or she acts promptly and satisfies the traditional standing criteria. *See* *United States ex rel. McGough v. Covington Techs. Co.*, 967 F.2d 1391, 1395 (9th Cir. 1992); *Yniguez v. Arizona*, 939 F.2d 727, 731 (9th Cir. 1991).

A non-named class member who objects in a timely manner to the approval of a class action settlement at the fairness hearing has the power to bring an appeal without first intervening. *See* *Devlin v. Scardelletti*, 536 U.S. 1, 9-10 (2002); *cf.* *Employers-Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Anchor Capital Advisors*, 498 F.3d 920, 925 (9th Cir. 2007) (non-parties who could have intervened and had notice of ongoing, uncertified, purported class-action proceedings, but who failed to intervene, lacked standing to appeal lead plaintiff settlement).

ii. Non-parties

> *Cross-reference:* II.D.4.f (regarding petitions for writ of mandamus by nonparties such as media organizers); *see also* *United States v. Mindel*, 80 F.3d 394, 398 (9th Cir. 1996) (declining to recognize nonparty standing to seek writ of mandamus outside First Amendment context).

A non-party may have standing to appeal if: (1) he or she "participated in the district court proceedings even though not a party, and; (2) the equities of the case weigh in favor of hearing the appeal." *Keith v. Volpe*, 118 F.3d 1386, 1391 (9th

Cir. 1997) (citation omitted). *But see* *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam) ("[T]he better practice is for . . . a nonparty to seek intervention for purposes of appeal . . ..").

"[T]he equities supporting a nonparty's right to appeal . . . are especially significant where [a party] has haled the nonparty into the proceeding against his will, and then has attempted to thwart the nonparty's right to appeal by arguing that he lacks standing." *Keith*, 118 F.3d at 1391 (citations omitted).

(a) Non-parties with Standing

The following nonparties were deemed to have standing to appeal:

- Non-party developer had standing to appeal injunction prohibiting state officials from issuing him a permit because he filed a brief and argued orally in response to an order to show cause, and the equities favored standing. *See id. at* 1391 & n.7 (9th Cir. 1997) (distinguishing *Marino v. Ortiz*, 484 U.S. 301 (1988)).

- Non-party country had standing to appeal injunction prohibiting estate and its aiders and abettors from disbursing assets because it was identified in the injunction as an aider/abettor, and it faced the choice of complying with the injunction or risking contempt proceedings. *See* *Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos Human Rights Litig.)*, 94 F.3d 539, 544 (9th Cir. 1996).

- Non-party bondholders had standing to appeal settlement of securities action that barred bondholders from suing settling defendants for losses incurred due to bond default. *See* *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1277 (9th Cir. 1992) ("[A] non-party who is enjoined or otherwise directly aggrieved by a judgment has standing to appeal the judgment without having intervened in the district court.") (citation omitted).

- Non-party IRS had standing to appeal order exonerating bail bond because it responded to order to show cause by "vigorously disputing" extent of appellee's interest in bail bond and it would be unjust to

preclude appeal by IRS from order directly addressing validity of its levy on a bail bond. *See* *United States v. Badger*, 930 F.2d 754, 756 (9th Cir. 1991).

- Non-party employees had standing to appeal district court order denying their request to participate in settlement of discrimination suit against employer, and approving the consent decree, because district court considered and rejected their claims on the merits and consent decree purports to bar them from future litigation. *See* *EEOC v. Pan Am. World Airways, Inc.*, 897 F.2d 1499, 1504 (9th Cir. 1990) ("[I]t would be a cruel irony to bar an appeal from an order denying permission to participate in litigation for the very reason that the would-be appellants did not participate below.").

- Non-party, who was named in original complaint but not in amended complaint, and who objected to district court's exercise of jurisdiction over him, had standing to appeal judgment entered against him. *See* *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1546-47 (9th Cir. 1990) ("If the record discloses that the district court lacked jurisdiction over the party, the appellate court has jurisdiction on appeal to correct the error.") (citation omitted).

- Non-party stockholder had standing to appeal disgorgement order entered against corporation he partially owned following judgment of fraud in SEC-initiated receivership action because he was haled into court against his will, was treated as a party by the district court, and would have been entitled to intervene as of right under Fed. R. Civ. P. 24(a). *See* *SEC v. Wencke*, 783 F.2d 829, 834-35 (9th Cir. 1986).

- Non-party United States Marshal had standing to appeal stipulated dismissal order awarding him a commission substantially lower than the amount he requested for his participation in a foreclosure action because he filed papers and argued orally in district court and he had no other avenue for appellate review. *See* *Bank of Am. v. M/V Executive*, 797 F.2d 772, 774 (9th Cir. 1986) (per curiam).

- An investor who was not a party before the district court in an action initiated by the Commodity Futures Trading Commission had standing to challenge the method of apportionment of disgorged funds, where the investor had participated in the proceedings to the fullest extent possible by writing to the receiver and the district court, filing a timely formal objection to the plan, and appearing pro se at the hearing. *Commodity Futures Trading Comm'n v. Topworth Int'l*, 205 F.3d 1107, 1113-14 (9th Cir. 1999).

(b) Non-Parties without Standing

The following nonparties were deemed not to have standing to appeal:

- Non-party police officers did not have standing to appeal a consent decree settling a discrimination suit against the police department, despite having presented their objections to the district court, because they failed to move to intervene as an initial matter or for purposes of appeal. *See* *Marino v. Ortiz*, 484 U.S. 301, 303-04 (1988) (per curiam) (rather than recognizing exceptions to the rule that only parties can appeal adverse judgments, "we think the better practice is for . . . a non-party to seek intervention for purposes of appeal," denial of which is appealable).

- Legislators who intervened as defendants in their official capacities did not have standing to appeal in their individual capacities after losing their posts. *See* *Karcher v. May*, 484 U.S. 72, 78 (1987) (citation omitted) (stating that acts performed by a single person in different capacities are generally treated as acts of different "legal personages").

- State did not have standing to appeal declaratory judgment against state officials because it failed to move to intervene in the district court, thereby avoiding risk of contempt for violating judgment or of waiving eleventh amendment immunity. *See* *Washoe Tribe of Nev. & Cal. v. Greenley*, 674 F.2d 816, 818-19 (9th Cir. 1982).
- Crime victims lacked standing to challenge on appeal the modification of a restitution order, even where the order originally incorporated a

settlement agreement between the victims and defendant. *See* *United States v. Mindel*, 80 F.3d 394, 396-98 (9th Cir. 1996) (concluding that crime victims also lacked standing to petition for writ of mandamus).

- A journalist lacked standing to proceed as a "next friend" for a death row prisoner scheduled for execution because he failed to show that the prisoner had a mental disease, disorder, or defect that substantially affected his capacity to make a rational choice concerning continuing or abandoning further proceedings. *See* *Massie v. Woodford*, 244 F.3d 1192, 1198-99 (9th Cir. 2001) (per curiam); *see also* *Dennis ex rel. Butko v. Budge*, 378 F.3d 880, 894 (9th Cir. 2004) (lawyer lacked next friend standing where prisoner's capacity to decide to forgo appeals was not substantially affected by mental illness). *Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153 (9th Cir. 2002) (coalition lacked next friend standing to file petition on behalf of Guantanamo Bay detainees).

- Republic of Philippines did not have appellate standing to challenge district court order where it was not prejudiced by orders, was not a party to the settlement agreement, was not bound by the settlement agreement, and where the settlement agreement required the Republic to do nothing. Additionally, there were no exceptional circumstances to justify non-party appellate standing. *See* *Hilao v. Estate of Marcos*, 393 F.3d 987, 992-93 (9th Cir. 2004).

b. Aggrieved by Order

i. Generally

A person has standing to appeal only if he or she is aggrieved by the challenged order. *See* *United States v. Good Samaritan Church*, 29 F.3d 487, 488 (9th Cir. 1994); *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 633 (9th Cir. 1992). A person is aggrieved by a district court order if it poses a threat of "particularized injury" leading to a "personal stake" in the outcome of the appeal. *See* *Didrickson v. United States Dep't of the Interior*, 982 F.2d 1332, 1338 (9th Cir. 1992) (party) (citations omitted); *EEOC v. Pan Am. World Airways, Inc.*, 897 F.2d 1499, 1504 (9th Cir. 1990) (non-party).

Ordinarily, a person may only appeal to protect his or her own interests, not those of a co-litigant, even though the outcome of the appeal may have some effect on him or her. *See* *Taxel v. Electronic Sports Research (In re Cinematronics, Inc.)*, 916 F.2d 1444, 1448 (9th Cir. 1990) (quotations and citations omitted). For example, the state lacked standing to appeal a district court ruling it claimed would establish law of the case as to its compensation claim where the court of appeals decided co-defendant's § 1292(b) appeal on alternate grounds. *See* *United States v. 5.96 Acres of Land*, 593 F.2d 884, 887 (9th Cir. 1979) (state was "unaffected" by appeal and could further develop factual record and legal arguments in district court if necessary).

However, an order denying in part a motion to intervene as of right may be appealed by the would-be intervenor even though he or she is not aggrieved by the final judgment itself because he or she could not appeal the order prior to entry of final judgment. *See* *Churchill County v. Babbitt*, 105 F.3d 1072, 1082 (9th Cir. 1998), *amended and superseded by* *Churchill County v, Babbitt*, 158 F.3d 491 (9th Cir. 1998).

> Cross-reference: II.C.19 (regarding appealability of orders denying motions to intervene).

ii. Standing of Class Members

Member of a plaintiff class had no standing to appeal portion of settlement awarding attorney's fees to class counsel because she asserted no economic or noneconomic injury. *See* *Wolford v. Gaekle (In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.)*, 33 F.3d 29, 30 (9th Cir. 1994) ("Simply being a member of a class is not enough to establish standing."). Potential, nonparty members of an uncertified plaintiff class in a class-action lawsuit lacked standing to appeal district court's decision granting lead plaintiff's motion to voluntarily dismiss, where the potential, nonparty members had notice and failed to intervene. *See* *Employers-Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Anchor Capital Advisors*, 498 F.3d 920, 925 (9th Cir. 2007).

iii. Standing of Attorneys/Clients

An attorney lacks standing to appeal an order disqualifying him from representing a client because the purported injury, if any, is to client's interest in

choosing counsel, not to counsel's interests. *See* *United States v. Chesnoff (In re Grand Jury Subpoena Issued to Chesnoff)*, 62 F.3d 1144, 1145-46 (9th Cir. 1995). Further, a district court's refusal to allow an attorney appear *pro hac vice* does not provide sufficient injury to confer standing. *See* *United States v. Ensign*, 491 F.3d 1109, 1115-1116 (9th Cir. 2007).

Conversely, a client lacks standing to appeal a sanctions order against attorney because, at most, the client has only an indirect financial stake in outcome of appeal. *See* *Estate of Bishop v. Bechtel Power Corp.*, 905 F.2d 1272, 1276 (9th Cir. 1990) (noting that "[a]n indirect financial stake in another party's claims is insufficient to create standing on appeal") (citation omitted); *but see* *Detabali v. St. Luke's Hospital*, 482 F.3d 1199, 1204 (9th Cir. 2007) (standing based on amended Fed. R. App. P. 3(c) where it was clear on face of notice to appeal that attorney intended to appeal); *Retail Flooring Dealers of America, Inc. v. Beaulieu of America, LLC*, 339 F.3d 1146, 1149 n.4 (9th Cir. 2003) (same).

iv. Standing of Prevailing Parties

A party generally does not have standing to appeal a judgment in his or her favor because the party is not aggrieved. *See* *United States v. Good Samaritan Church*, 29 F.3d 487, 488-89 (9th Cir. 1994) (prevailing defendants lacked standing to challenge adverse alter ego determination that did not appear in, and was not necessary to, the judgment of dismissal); *Bernstein v. GTE Directories Corp.*, 827 F.2d 480, 482 (9th Cir. 1987) (losing plaintiffs lacked standing to challenge district court's finding that contract was adhesive on appeal from partial summary judgment for defendants because that aspect of the judgment was resolved in plaintiffs' favor).

However, a prevailing party may have standing to appeal an adverse collateral ruling if the ruling appears in the judgment itself. *See* *Good Samaritan Church*, 29 F.3d at 488 (rule that only an aggrieved party may appeal from a judgment is a matter of federal appellate practice, not constitutional standing). In such a case, the court of appeals may review the ruling for purposes of directing reformation of the decree. *See* *id.*

A prevailing party was aggrieved by the district court's decision enjoining its operations, and thus had standing to appeal the decision, even though the district

court subsequently dismissed the suit against the defendant as moot, where the district court knew at time it issued the injunction that the cause was moot. *EPIC, Inc. v. Pacific Lumber Co.*, 257 F.3d 1071, 1077 (9th Cir. 2001).

v. Remittitur Orders

"[A] plaintiff cannot appeal the propriety of a remittitur order to which he has agreed." *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977) (per curiam) (citations omitted); *see also Seymour v. Summa Vista Cinema, Inc.*, 809 F.2d 1385, 1387-88 (9th Cir. 1987).

Although a party is precluded from attacking a remittitur order to which he or she consented, the party may challenge other aspects of the judgment. *See Denholm v. Houghton Mifflin Co.*, 912 F.2d 357, 359-60 (9th Cir. 1990).

vi. Standing to Appeal Voluntary Dismissal

A voluntary dismissal with prejudice is generally not appealable where it is entered unconditionally pursuant to a settlement agreement. *See Seidman v. City of Beverly Hills*, 785 F.2d 1447, 1448 (9th Cir. 1986) (order). Moreover, a voluntary dismissal without prejudice is generally not appealable because it is not adverse to the appellant's interests. *See Concha v. London*, 62 F.3d 1493, 1507 (9th Cir. 1995) ("[P]laintiff is free to seek an adjudication of the same issue at another time in the same or another forum.").

However, an order adjudicating certain claims and voluntarily dismissing remaining claims with prejudice is appealable because the plaintiff does not have the option of later pursuing the dismissed claims. *See Concha v. London*, 62 F.3d 1493, 1507-08 (9th Cir. 1995); *Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073, 1076-77 (9th Cir. 1994).

> *Cross-reference*: II.C.13.b.v, vi (regarding the appealability of voluntary dismissal orders generally).

B. MOOTNESS

Cross-reference: VI.F.2 (regarding mootness in bankruptcy cases); VIII.J (regarding mootness in direct criminal appeals).

1. JURISDICTIONAL NATURE OF MOOTNESS

A federal court's jurisdiction is limited to cases or controversies. A claim is moot if it has lost its character as a present, live controversy. *See* *Flint v. Dennison*, 488 F.3d 816, 823 (9th Cir. 2007). A federal court does not have jurisdiction to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law that cannot affect the matter in issue in the case before it. *American Rivers v. National Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997) (internal quotation marks and citations omitted); *accord* *Cammermeyer v. Perry*, 97 F.3d 1235, 1237 (9th Cir. 1996) ("[T]he Article III case or controversy requirement denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them. . . . federal courts may resolve only real and substantial controversies admitting of specific relief . . . .") (internal quotation marks, brackets, and citations omitted).

Because mootness is a jurisdictional issue, federal courts must consider the question independent of the parties' argument. *See* *id.* at 1237 n.3. A federal court has an obligation to consider mootness *sua sponte*. *See* *NASD Dispute Resolution, Inc. v. Judicial Council*, 488 F.3d 1065, 1068 (9th Cir. 2007).

2. GENERAL STANDARD FOR ASSESSING MOOTNESS

a. Availability of Effective Relief

"A claim is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. The basic question is whether there exists a present controversy as to which effective relief can be granted." *Village of Gambell v. Babbitt*, 999 F.2d 403, 406 (9th Cir. 1993) (internal quotation marks and citations omitted); *accord* *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1274 (9th Cir. 1997); *United States v. Tanoue*, 94 F.3d 1342, 1344 (9th Cir. 1996) ("[A]n appeal must be dismissed as moot if an event occurs while the appeal is pending that makes it impossible for the appellate

court to grant any effective relief whatever to the prevailing party.") (internal quotation marks and citations omitted); *see also* *United States v. Strong*, 489 F.3d 1055, 1059-60 (9th Cir. 2007); *cf.* *Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 933-34 (9th Cir. 2008) (explaining that despite superceding events that mitigate against injury do not moot case where there remains "present effects that are legally significant.") (internal quotation marks and citation omitted).

The parties' stipulated voluntary dismissal of an action removed to district court did not moot the action when the purpose of the dismissal was not to settle the case, but to permit the parties immediately to appeal the district court's denial of a motion to remand the action, and the appellate court could order effective relief. *Oregon Bureau of Labor and Indus. v. U.S. West Comms., Inc.*, 288 F.3d 414, 417 (9th Cir. 2002).

b. Kinds of Relief Available to Preclude Mootness

i. Generally

In deciding whether an appeal is moot because effective relief cannot be granted, "[t]he question is not whether the precise relief sought at the time the application for an injunction was filed is still available . . . [but] whether there can be any effective relief." *Jerron West, Inc. v. California State Bd. of Equalization*, 129 F.3d 1334, 1336 (9th Cir. 1997) (internal quotation marks and citation omitted).

Any relief that might be effective must also be authorized by law. *See* *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997) (for damages claim to sustain a controversy, damages must be available as a remedy for the cause of action).

ii. Focus on Injuries for Which Relief is Sought

In considering whether any effective remedy is available, the court of appeals focuses on the particular injuries alleged by the party seeking relief. *See* *Nome Eskimo Community v. Babbit*, 67 F.3d 813, 815-16 (9th Cir. 1995) (in finding case moot based on government's discontinued effort to lease mineral

rights in seas floor, court noted that plaintiffs did not seek to quiet title in the sea floor, did not sue for alleged trespasses, and sought no relief relating to their alleged fishing rights); *Village of Gambell v. Babbitt*, 999 F.2d 403, 406-07 (9th Cir. 1993) (same); *Headwaters, Inc. v. Bureau of Land Mgmt.*, 893 F.2d 1012, 1014-15 (9th Cir. 1989) (concluding that lawsuit seeking to enjoin logging was moot after trees involved were logged).

Thus, the availability of effective relief as to one claim will not sustain a controversy as to another. *See Cammermeyer v. Perry*, 97 F.3d 1235, 1238 (9th Cir. 1996) (existence of a claim for attorney's fees did not resuscitate an otherwise moot controversy).

iii. Availability of Damages to Preclude Mootness

The court of appeals is not required to dismiss an appeal concerning moot claims for injunctive and declaratory relief where the district court could award damages notwithstanding plaintiff's failure to plead damages as a remedy. *See Z Channel Ltd. v. Home Box Office, Inc.*, 931 F.2d 1338, 1341 (9th Cir. 1991); *see also Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 902 (9th Cir. 2007); *McQuillion v. Schwartzenegger*, 369 F.3d 1091, 1095-96 (9th Cir. 2004).

Even nominal damages are sufficient to prevent dismissal for mootness. *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 425-26 (9th Cir. 2008). However, "a claim for nominal damages, extracted late in the day from [plaintiff's] general prayer for relief and asserted solely to avoid otherwise certain mootness, [bears] close inspection." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997).

Even when the underlying action is no longer pending and plaintiff's claims for prospective relief are moot, the possibility of entitlement to nominal damages can create a continuing live controversy. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002).

c. "Speculative Contingencies" Insufficient to Sustain Controversy

"Speculative contingencies" are insufficient to sustain an otherwise moot controversy. *See* *Dufresne v. Veneman*, 114 F.3d 952, 955 (9th Cir. 1997) (per curiam) (in case where claims for injunctive relief against aerial pesticide spraying were mooted by eradication of insect and likely use of other means to fight future infestation, the possibility of future spraying was insufficient to sustain controversy); *Mayfield v. Dalton*, 109 F.3d 1423, 1425 (9th Cir. 1997) (where members of military had challenged constitutionality of military program to collect and store tissue samples, case became moot upon members' separation from military because, although they might be required to return to active duty in an emergency, such a "speculative contingency" was insufficient to sustain controversy).

Speculation that a case will become moot does not moot the case. *See* *Negrete v. Allianz Life Ins. Co.*, 523 F.3d 1091, 1097-98 (9th Cir. 2008) (concluding that possibility that district court will withdraw complained-of order does not moot the case). Also, where a reasonable likelihood remains that the parties will contest the same issues in a subsequent proceeding, a controversy will not be moot. *See* *Western Oil & Gas Ass'n v. Sonoma County*, 905 F.2d 1287, 1290-91 (9th Cir. 1990) (adopting Third Circuit's "reasonable likelihood" standard and holding that appeal concerning offshore oil and gas development was not mooted by moratorium on leasing activities).

d. Controversy Must Continue Throughout Litigation

"If an event occurs during the pendency of the appeal that renders the case moot, [the court] lack[s] jurisdiction." *Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 963 (9th Cir. 2007). "To qualify for adjudication in federal court, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Di Giorgio v. Lee (In re Di Giorgio)*, 134 F.3d 971, 974 (9th Cir. 1998) (internal quotation marks and citations omitted); *accord* *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1509 (9th Cir. 1994) ("Mootness is the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).") (internal quotation marks and citations omitted); *cf.* *Flint v.*

Dennison, 488 F.3d 816, 824-25 (9th Cir. 2007) (explaining that while a student's graduation generally moots a case demanding declaratory or injunctive relief from a school policy, the case is not moot where the graduated student's records contain negative information derived from the allegedly improper school policies and regulations).

"Whenever an action loses its character as a present live controversy during the course of litigation, federal courts are required to dismiss the action as moot." *Di Giorgio*, 134 F.3d at 974 (internal quotation marks and citations omitted).

3. EXCEPTIONS TO MOOTNESS

a. "Capable of Repetition Yet Evading Review"

i. General Standard

To satisfy the "capable of repetition yet evading review" exception to mootness, two criteria must be met: "there must be a 'reasonable expectation' that the same complaining party will be subject to the same injury again [and] the injury suffered must be of a type inherently limited in duration such that it is likely always to become moot before federal court litigation is completed." *Cammermeyer v. Perry*, 97 F.3d 1235, 1238 (9th Cir. 1996) (internal quotation marks and citation omitted); *accord* *American Rivers v. National Marine Fisheries Serv.*, 126 F.3d 1118, 1124 (9th Cir. 1997) (reiterating criteria and noting that exception is "limited to extraordinary cases").

ii. Events Capable of Being Stayed Pending Appeal

Events that can be stayed pending appeal do not evade review; thus, the "capable of repetition" exception does not apply when mootness results from an appellant's failure to obtain a stay. *See* *Kasza v. Browner*, 133 F.3d 1159, 1174 (9th Cir. 1998) (where EPA sought and received presidential exemption from statutory disclosure requirements, agency's appeal from order requiring disclosure was moot, as agency could have sought stay of district court order but did not); *Bunker Ltd. P'ship v. United States (In re Bunker Ltd. P'ship)*, 820 F.2d 308, 311 (9th Cir. 1987) ("[A] party may not profit from the 'capable of repetition, yet

evading review' exception to mootness, where through his own failure to seek and obtain a stay he has prevented an appellate court from reviewing the trial court's decision.").

iii. Particular Cases Found Justiciable

Sherman v. United States Parole Comm'n, 502 F.3d 869, 872-73 (9th Cir. 2007) (habeas petition to review detention on a parole violator warrant not moot despite issuance of revocation order because it was "capable of repetition yet evading review"); *United States v. Howard*, 480 F.3d 1005, 1010-11 (9th Cir. 2007) (concluding that appeal from district court's decision affirming requirement imposed by magistrate judges that defendants wear leg shackles while making initial appearance was an issue capable of repetition yet evading review); *Demery v. Arpaio*, 378 F.3d 1020 (9th Cir. 2004) (appeal from grant of preliminary injunction not mooted, even though challenged website through which images of pretrial detainees were distributed had been terminated where sheriff intended to and was likely to find another webhost willing to display the images); *Miller ex rel. NLRB v. California Pac. Med. Ctr.*, 19 F.3d 449, 453-54 (9th Cir. 1994) (en banc) (appeal from district court injunction pursuant to § 10(j) of NLRA not mooted by NLRB decision on merits where issue of what standard to apply in § 10(j) proceedings was important, issue could not be expected to reach the Supreme Court before NLRB decision would moot cases, and both parties were reasonably likely to be involved in another dispute raising same issue); *Sacramento City Unified Sch. Dist. Bd. of Educ v. Rachel H. by and through Holland*, 14 F.3d 1398, 1403 (9th Cir. 1994) (challenge to school placement under Individuals with Disabilities Education Act is not moot where school year does not provide enough time for judicial review and issues affecting child's education were likely to arise again between parties); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329-30 (9th Cir. 1992) (challenged regulation was in effect less than one year, major issue presented was likely to recur in future, future regulation would be based on same biological opinion as supported previous regulation, continuing public interest existed in controversy, and expiration of challenged regulation could not have been enjoined); *Johansen ex rel. NLRB v. San Diego County Dist. Council of Carpenters of United Bhd. of Carpenters and Joiners of Am., AFL-CIO*, 745 F.2d 1289, 1292-93 (9th Cir. 1984) (per curiam) (dispute concerning 10-day injunction in labor dispute was too short in duration to be fully litigated prior to cessation, and the

parties to the dispute would continue to face each other across the bargaining table).

iv. Particular Cases Found Not Justiciable

Ctr. for Biological Diversity v. Lohn, 511 F.3d 960, 965-66 (9th Cir. 2007) (challenge to agency policy mooted where agency adopted change in agency decision demanded in complaint); *Ramsey v. Kantor*, 96 F.3d 434, 445-46 (9th Cir. 1996) (challenge to agency action moot where, although certain elements of agencies' future fish harvest calculations remained the same as past challenged calculations, other elements would be different); *Mitchell v. Dupnik*, 75 F.3d 517, 528 (9th Cir. 1996) (after denial of plaintiff's requests for post-conviction relief, there was no longer any reason to believe he would be returned to the jail against which he sought an injunction regarding its library access policy); *Shoshone-Bannock Tribes v. Fish & Game Comm'n, Idaho*, 42 F.3d 1278, 1282-83 (9th Cir. 1994) (although duration of state agency's order barring all fishing during one fishing season was too short to be fully litigated before its expiration, "[t]he circumstances of each year's salmon run are different, and the necessary conservation measures will change with them" and there was no absence of legal standards by which to guide parties in future conflicts such that exception to mootness doctrine would not apply); *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994) (concluding that, where challenged statute was repealed, case was moot because plaintiff asserted only a "theoretical possibilit[y]" that injury would recur and plaintiff made no showing that injury was "of such inherently limited duration that it is likely always to become moot prior to review").

Media's petition for mandamus that challenged district court order closing some pretrial proceedings in prosecution of defendant charged with bombings was moot once requested information had been released, where media did not show that there was reasonable expectation that it would be excluded again in a case presenting essentially same factual circumstances, or that its injury was so intrinsically limited in duration that it could not be fully litigated in federal court. *Unabom Trial Media Coalition v. United States Dist. Court*, 183 F.3d 949, 953 (9th Cir. 1999).

b. Voluntary Cessation

i. General Standard

A defendant's voluntary cessation of offending conduct will moot a case where "(1) subsequent events have made it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1274 (9th Cir. 1997) (internal quotation marks, brackets, and citations omitted).

A defendant's cessation of offensive conduct "must have arisen because of the litigation" in order to prevent the case from being moot. *Sze v. INS*, 153 F.3d 1005, 1008 (9th Cir. 1998) (citation omitted), *overruled in part on other grounds by United States v. Hovsepian*, 359 F.3d 1144, 1161 n.13 (9th Cir. 2004). Where plaintiffs show no more than a correlation, and not causation, between the litigation and cessation, the case is moot. *See id.* The defendant has the burden of showing that voluntary cessation moots a case. *See Lozano v. AT&T Wireless Servs.*, 504 F.3d 718, 732-33 (9th Cir. 2007).

ii. Particular Cases Found Justiciable

Lozano v. AT&T Wireless Servs., 504 F.3d 718, 733 (9th Cir. 2007) (defendant could not satisfy burden of showing that wrongful behavior could not reasonably be expected to recur); *Porter v. Bowen*, 496 F.3d 1009, 1016 (9th Cir. 2007) (defendant state prosecutor's letter to state legislature was insufficient to show a voluntary cessation); *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1274-75 (9th Cir. 1997) (defendants' discontinuation of challenged medical testing failed to establish that plaintiffs' claims for injunctive and declaratory relief were moot where defendants did not contend that they will never again conduct the tests, and defendants retained prior test results that could be ordered expunged).

iii. Particular Cases Not Justiciable

Pub. Utils. Comm'n v. Fed. Energy Regulatory Comm'n, 100 F.3d 1451, 1460 (9th Cir. 1996) (voluntary cessation exception to mootness did not apply, and

case concerning agency's issuance of certificate was moot, where applicant refused the certificate based on economic and business considerations and not because of pending litigation and, further, it was the respondent in the appeal and the federal agency had no control over the applicant's decision to refuse the certificate); *Oregon Natural Resources Council, Inc. v. Grossarth*, 979 F.2d 1377, 1379 (9th Cir. 1992) (where government agency is forced to take action as a result of administrative proceedings, the doctrine governing voluntary cessation of offending conduct does not apply).

A Clean Water Act citizen suit seeking injunctive relief did not automatically become moot once the company came into substantial compliance with a permit because a defendant's voluntary cessation of a challenged practice ordinarily does not deprive a federal court of its power to determine the legality of the practice. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 169 (2000).

4. MOOTNESS PRINCIPLES IN PARTICULAR CONTEXTS

a. Cases Involving Changes to Legislation or Regulations

i. Generally

Generally, a statutory change is enough to render moot a challenge to the statute, even if the legislature has the power to reenact the statute after the lawsuit is dismissed – but an exception exists in rare cases where it is virtually certain that repealed law will be reenacted. *See Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994) (citations omitted).

ii. Cases Not Mooted

Natural Res. Def. Council v. Winter, 518 F.3d 658, 679 (9th Cir. 2008) (explaining that only a valid agency action can moot a legal claim); *Jacobus v. Alaska*, 338 F.3d 1095 (9th Cir. 2003) (concluding that Alaska Legislature's repeal of two out of three provisions of a challenged law in response to the district court's judgment of unconstitutionality did not render moot the plaintiff's challenge to the

provisions since plaintiffs would likely experience prosecution and civil penalties for past violations of repealed provisions); *Kescoli v. Babbitt*, 101 F.3d 1304, 1308-09 (9th Cir. 1996) (concluding that challenge to condition in mining permit was not mooted by expiration of permit where a renewal permit retained the challenged condition without material modification); *United Parcel Serv., Inc. v. California Pub. Utils. Comm'n*, 77 F.3d 1178, 1181-82 (9th Cir. 1996) (concluding that carrier's challenge to state rate-setting decision was not moot despite enactment of statute deregulating industry because state agency continued to assert that carrier was liable for refunds for past overcharging); *Public Serv. Co. v. Shoshone-Bannock Tribes*, 30 F.3d 1203, 1205-06 (9th Cir. 1994) (concluding that amendment to challenged ordinance did not moot appeal where controversy over whether ordinance preempted by federal law continued); *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1011 (9th Cir. 1994) (concluding that except as to one regulated species, challenge to emergency regulations was not mooted by adoption of permanent regulations that were "essentially the same"); *Farmers Union Cent. Exch., Inc. v. Thomas*, 881 F.2d 757, 759-60 (9th Cir. 1989) (concluding that appeal was not moot where agency terminated regulatory program because agency could still subject appellant to enforcement proceedings).

iii. Cases Mooted

Consejo De Desarrollo Economico De Mexicali, A.C. v. United States, 482 F.3d 1157, 1168-74 (9th Cir. 2007) (intervening legislature mooted plaintiff's case against government canal-lining project); *Cammermeyer v. Perry*, 97 F.3d 1235, 1237-38 (9th Cir. 1996) (statutory and regulatory changes were sufficient to moot constitutional challenge to military policy concerning homosexuality); *Bullfrog Films, Inc. v. Wick*, 959 F.2d 778, 781 (9th Cir. 1992) (challenge to implementing regulations mooted by change in underlying legislation); *Nevada v. Watkins*, 943 F.2d 1080, 1083-87 (9th Cir. 1991) (case seeking review of environmental assessment was moot where subsequent legislation mandated outcome of environmental assessment).

Claims for declaratory and injunctive relief with respect to a state law school's use of race as a criterion in its admissions policy were moot, and class for such relief was properly decertified, once state initiative measure was passed that directed that "in operation of . . . public education" the state was prohibited from discriminating or offering preferential treatment to "any individual or group on the

basis of race, sex, color, ethnicity, or national origin." *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1193 (9th Cir. 2000).

Alaska Native villages' appeal from the district court's decision upholding government's award of health services compact to Alaska Native Regional Corporation without the villages' approval was moot in view of a statute, enacted while an appeal was pending, that provided that the Corporation was authorized to enter contracts or funding agreements without submission of authorizing resolutions from the villages, when the villages sought only prospective relief. *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 990 (9th Cir. 1999).

Section 1983 action was rendered moot when university officials revised code removing provisions which state university students had challenged, and committed not to reenact them unless there was a change in federal law. *Students for a Conservative America v. Greenwood*, 378 F.3d 1129, 1131 (9th Cir. 2004).

b. Declaratory Relief Cases

To determine "whether a request for declaratory relief has become moot, basically the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Kasza v. Browner*, 133 F.3d 1159, 1172 (9th Cir. 1998) (internal quotation marks, brackets, and citations omitted); *see also Shoshone-Bannock Tribes v. Fish & Game Comm'n Idaho*, 42 F.3d 1278, 1281 (9th Cir. 1994) (stating that a party retains a legally cognizable interest in obtaining declaratory relief against government authorities "only when the challenged government activity is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning party") (internal punctuation modified and citations omitted).

c. Cases Involving Property

Cross-reference: VI.F.2 (regarding mootness in bankruptcy cases).

i. Cases Not Mooted

Goodwin v. United States, 935 F.2d 1061, 1063-64 (9th Cir. 1991) (in case outside of bankruptcy context, sale of property did not moot appeal where properly filed lis pendens would give effect to court's judgment under applicable state law).

An action by homeowners challenging a low-income housing project under the National Historic Preservation Act and the National Environmental Protection Act was not moot as to claims against the government, though the project was complete, as changes could still be made to alleviate any adverse effects. *Tyler v. Cuomo*, 236 F.3d 1124, 1137 (9th Cir. 2000).

An action challenging a decision of Federal Highway Administration to exclude categorically a two-stage highway interchange project from review under the National Environmental Policy Act was not moot, even though first stage of project was complete and new interchange was carrying traffic; because the second stage had not begun, and the court's remedial powers included remanding for additional environmental review and ordering interchange closed or taken down. *West v. Secretary of Dep't of Transp.*, 206 F.3d 920, 924-26 (9th Cir. 2000).

ii. Cases Mooted

Di Giorgio v. Lee (In re Di Giorgio), 134 F.3d 971, 974 (9th Cir. 1998) (where debtors surrendered possession of property prior to hearing at which they sought to enjoin enforcement of a lessor's writ of possession, the trial court erred by not dismissing their action as moot); *Village of Gambell v. Babbitt*, 999 F.2d 403, 406-07 (9th Cir. 1993) (where oil companies had relinquished lease tracts that had composed challenged government sale of leases, action was moot); *Fultz v. Rose*, 833 F.2d 1380, 1380 (9th Cir. 1987) (order) (appeal moot where property at issue sold to third party in compliance with district court order); *Holloway v. United States*, 789 F.2d 1372, 1373-74 (9th Cir. 1986) (appeal from order allowing sale of property to satisfy taxes moot in absence of stay).

d. In Rem and Civil Forfeiture Cases

In a civil in rem forfeiture action brought by the government, an appellate court is not divested of jurisdiction by the prevailing party's transfer of the res

from the district. *See* *Republic Nat'l Bank v. United States*, 506 U.S. 80, 88-89 (1992) (opinion for the Court by Blackmun, J.).

The Ninth Circuit has applied this rule in both in rem and quasi in rem admiralty cases. *See* *Edlin v. M/V Truthseeker*, 69 F.3d 392, 393 (9th Cir. 1995) (per curiam) (fact that stay of execution had been vacated and vessel sold pursuant to mandate of court of appeals did not divest court of jurisdiction to consider a post-judgment request for certain costs on appeal in in rem forfeiture action); *J. Lauritzen A/S v. Dashwood Shipping, Ltd.*, 65 F.3d 139, 141-42 (9th Cir. 1995) (district court order vacating attachment of vessel in quasi in rem proceeding did not divest appellate jurisdiction over appeal from order dismissing action); *Stevedoring Servs. of Am. v. Ancora Transp., N.V.*, 59 F.3d 879, 882-83 (9th Cir. 1995) (district court's release of funds garnished in a quasi in rem maritime action did not deprive it of jurisdiction over the res).

In government forfeiture cases, a transfer to the U.S. Treasury of funds derived from the sale of a res that is the subject of the action does not moot the case, as statutory authorization exists for an appropriation of funds in the event the party claiming entitlement to the funds prevails. *See* *Republic Nat'l Bank v. United States*, 506 U.S. 80, 95-96 (1992) (opinion for the Court by Rehnquist, C.J.).

e. Preliminary Injunction Cases

Preliminary injunction appeals are usually mooted by district court decisions on claims for permanent injunctions. *See* *Hilao v. Estate of Marcos (In re Estate of Marcos Human Rights Litig.)*, 94 F.3d 539, 544 (9th Cir. 1996) ("Where a permanent injunction has been granted that supersedes the original preliminary injunction, the interlocutory preliminary order is properly dismissed.") (internal quotation marks, brackets, and citation omitted).

Similarly, dismissal of certain of plaintiff's claims while an appeal regarding a preliminary injunction is pending will moot issues on appeal regarding the dismissed claims. *See* *ACF Indus. Inc. v. California State Bd. of Equalization*, 42 F.3d 1286, 1291 (9th Cir. 1994).

f. Cases Regarding Summons and Subpoenas

Compliance with administrative summons and subpoenas does not moot challenges to the requests, as courts can still order the material to be returned or destroyed. *See* *Church of Scientology v. United States*, 506 U.S. 9, 12-13 (1992) (compliance with IRS summons enforcement order does not render appeal moot where court could still fashion some form of meaningful relief, such as ordering return of summoned material); *United States v. Tanoue*, 94 F.3d 1342, 1344 (9th Cir. 1996) (concluding that defendant's compliance with IRS summons seeking handwriting exemplar did not moot appeal from order enforcing summons because "meaningful relief is available in the form of an order directing the government to return the summoned materials and to destroy any copies in the government's possession").

g. Class Actions

Where a class action has previously been certified, mootness of the class representative's claims will not necessarily moot case. *See Doe by and through Brockhuis v. Arizona Dep't of Educ.*, 111 F.3d 678, 679 n.1, 680 (9th Cir. 1997) (plaintiff's claim for injunctive relief was not mooted by relief provided to him where he could fairly represent a certified class that raised colorable claims) (citing *Sosna v. Iowa*, 419 U.S. 393, 401-02 (1975)).

Where the class has not previously been certified, assessment of the mootness issue begins with whether or not the district court denied class certification. *See* *Sze v. INS*, 153 F.3d 1005, 1009-10 (9th Cir. 1998) (where merits of plaintiff's claim become moot on appeal after district court denies class certification, court of appeals must consider nature of plaintiff's personal stake in class certification claim in deciding whether to dismiss case as moot; where class certification has not yet been considered by district court, court of appeals should consider whether the class appears to be "so transitory that a failure to rule may mean that a class will never be assembled" or whether other putative class members relied on plaintiff's asserted representation of the class) (internal quotation marks and citations omitted); *see also* *Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1321 (9th Cir. 1997) (assessing suitability of putative class member to appeal denial of class certification following original named plaintiffs' settlement of lawsuit).

In seeking to sustain a potential class action in which the putative class representative's claims have become moot, it is important that the class identify other possible representatives. *See* *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997) (where claims of putative class representatives had become moot during their appeal, issue regarding district court's denial of class certification would not sustain controversy where appellants failed to show there were others who could represent an appropriate class). If no class is properly certified, and the claims of all named plaintiffs are satisfied, the case is moot. *See* *Employers-Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Anchor Capital Advisors*, 498 F.3d 920, 924 (9th Cir. 2007).

h. Cases Concerning Intervention

A district court's decision on the merits does not moot an appeal from a prior order denying intervention, at least where the district court had not yet entered judgment and where reversal of the order denying intervention would give the potential intervenor standing to appeal district court's decision on merits. *See* *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1301 n.1 (9th Cir. 1997).

i. Insurance Cases

An insurer's appeal of denial of declaratory relief will be mooted by settlement, or at least an unconditional settlement, of underlying lawsuits that led to the initial request for relief. *Continental Cas. Co. v. Fibreboard Corp.*, 4 F.3d 777, 779 (9th Cir. 1993).

A final determination on the merits moots an appeal from an order directing the insurer to advance the costs of an insured's defense incurred during a lawsuit allegedly covered by a liability policy – even where the insurer may have a separate claim against the insured for reimbursement of such costs. *See* *American Cas. Co. v. Baker*, 22 F.3d 880, 895-96 (9th Cir. 1994).

j. Environmental Cases

An action in which an environmental organization sought to prevent the National Park Service (NPS) from killing feral pigs on Santa Cruz Island was

mooted when the NPS actually killed all the feral pigs on the island. The court could provide no remedy to the environmental organization. *Feldman v. Bomar*, 518 F.3d 637, 643-44 (9th Cir. 2008).

An action in which an environmental organization challenged the National Marine Fisheries Service's policy for determining endangered species was mooted when the agency placed the species at issue on the endangered species list. *Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 966 (9th Cir. 2007).

An action in which an environmental organization sought to compel the Fish and Wildlife Service to make determinations as to whether certain species should be listed as endangered was not rendered moot when the Service made several such determinations where (1) the environmental organizations had been parties in several other actions in which the Service failed to meet listing determination deadlines until after litigation began, (2) the organizations had other pending petitions, and (3) the Service continued to interpret the Endangered Species Act to allow it to delay action indefinitely. *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1174-75 (9th Cir. 2002).

Defendants face a particularly heavy burden in establishing mootness in environmental cases, and the completion of the action challenged is insufficient to render the case nonjusticiable. *Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001).

5. SCOPE OF MOOTING EVENT'S EFFECT

a. Relationship Among Claims for Retrospective and Prospective Relief

Events that moot claims for prospective relief do not necessarily moot claims for retrospective relief. *See Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 462 n.5 (1997) (claim seeking refund of past assessments made for generic advertising sustained challenge to regulations imposing past assessments, although claims regarding future assessments were mooted by discontinuation of assessments).

Conversely, appeal regarding claims for prospective relief may survive the settlement of damages claims. *Nava v. City of Dublin*, 121 F.3d 453, 455 (9th Cir. 1997) (stating that although settlement of damages claims may moot appeal regarding declaratory relief, it will not moot appeal of injunction that calls for continuing supervision of defendant by district court because "[t]he injunction must be obeyed until it is stayed, dissolved, or reversed, even it if is erroneously issued") (citation omitted), *overruled by* *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc) (standing to seek damages does not alone serve as a basis for standing to seek equitable relief).

Claims for declaratory relief may survive mooted claims for injunctive relief. *See* *American Tunaboat Ass'n v. Brown*, 67 F.3d 1404, 1407-08 (9th Cir. 1995) (appeal of denial of preliminary injunction mooted where proposed injunction was directed at conduct during a time period that had since passed; however, request for declaratory relief not moot where district court's decision would affect future conduct).

b. Relationship between Merits and Claims for Attorney's Fees

"[C]laims for attorneys' fees ancillary to the case survive independently under the court's equitable jurisdiction, and may be heard even though the underlying case has become moot." *Cammermeyer v. Perry*, 97 F.3d 1235, 1238 (9th Cir. 1996) (internal quotation marks and citations omitted); *see also* *Martinez v. Wilson*, 32 F.3d 1415, 1422 n.8 (9th Cir. 1994) (observing that mootness on appeal "does not alter the plaintiff's status as a prevailing party provided the plaintiff achieved that status before the case was rendered moot") (citation omitted).

6. PROCEDURAL ASPECTS OF MOOTNESS

a. Duty of Counsel to Notify Court

"It is the duty of counsel to bring to the federal tribunal's attention, without delay, facts that may raise a question of mootness," regardless of the view of opposing counsel. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997) (internal quotation marks and citation omitted).

b. Burden of Proof

"If a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with the subsequent events that have produced that alleged result." *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993) (citation omitted).

"[T]he burden of demonstrating mootness is 'heavy' and must be carried by the party claiming that the case is moot." *Porter v. Bowen*, 496 F.3d 1009, 1017 (9th Cir. 2007). "The party asserting mootness has a heavy burden to establish that there is no effective relief remaining for a court to provide." *Pintlar Corp. v. Fidelity & Cas. Co. (In re Pintlar Corp.)*, 124 F.3d 1310, 1312 (9th Cir. 1997) (citation omitted); *accord Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1274 (9th Cir. 1997) (burden of demonstrating mootness is a heavy one); *Focus Media, Inc. v. Nat'l Broad. Co.*, 378 F.3d 916, 923 (9th Cir. 2004) (same).

c. Disposition of Moot Appeals

Where an appeal becomes moot "through happenstance – circumstances not attributable to the parties – or . . . the unilateral action of the party who prevailed in the lower court," the court of appeals should "vacate the judgment below and remand with a direction to dismiss." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (internal quotation marks and citations omitted); *see Anderson v. Green*, 513 U.S. 557, 560 (1995) (per curiam) (vacating court of appeals' judgment and remanding for vacatur of district court's judgment and dismissal of case where party seeking relief from judgment did not voluntarily cause the case to become nonjusticiable); *see also NASD Dispute Resolution, Inc. v. Judicial Council*, 488 F.3d 1065, 1070 (9th Cir. 2007) (mootness by happenstance provides reason to vacate the judgment below); *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997) (where appellants challenging military policy were separated from military, they did not voluntarily moot the appeal and the usual rule of vacatur and dismissal would apply).

Where an appeal becomes moot due to the appellant's voluntary action (such as settlement or his or her failure to take steps to preserve the controversy), the court of appeals should not vacate the lower court's judgment. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 29 (1994) (holding that

mootness by reason of settlement does not justify vacatur, but noting that it may be proper for the court of appeals to order vacatur when mootness is produced by settlement under "exceptional circumstances"); *Public Utils. Comm'n v. Federal Energy Regulatory Comm'n*, 100 F.3d 1451, 1461 (9th Cir. 1996) (stating that exceptions to automatic vacatur exist when "the party seeking appellate relief fails to protect itself or is the cause of subsequent mootness"); *Dunlavey v. Arizona Title Ins. & Trust Co. (In re Charlton)*, 708 F.2d 1449, 1454-55 (9th Cir. 1983) (stating that party who fails to obtain a stay pending appeal of an order authorizing sale of property is not entitled to have the order vacated based on mootness); *see also Cammermeyer v. Perry*, 97 F.3d 1235, 1239 (9th Cir. 1996) (stating that the principal factor courts consider in deciding whether to vacate a lower court's judgment is "whether the party seeking relief from the judgment below caused the mootness by voluntary action") (internal quotation marks and citation omitted).

Under these circumstances, the Ninth Circuit will remand for a determination by the district court whether vacatur is appropriate. *See id.* (court of appeals would not vacate lower court's judgment where appellants had rendered case moot by conceding correctness of district court's decision, but case would be remanded to district court to determine whether vacatur was appropriate); *Mancinelli v. International Bus. Machs. Corp.*, 95 F.3d 799, 799 (9th Cir. 1996) (order) (vacating court of appeals's decision following settlement and remanding case to district court for determination whether vacatur of district court judgment was appropriate).